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# REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

*2d District*

## SURROGATES' COURTS,

OF THE

STATE OF NEW YORK.

BY

THEODORE F. C. DEMAREST.

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VOL. IV.

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# TABLE OF CASES REPORTED

## IN THIS VOLUME.

---

	Page
ADAMS v. VAN VLECK. Executors will not be directed to dispose of unauthorized securities, found among testator's assets, upon a mere objection filed to their account, no damage being proved .....	348
ARBOGAST, VOGEL v. ....	399
 BACON v. BACON. Will when deemed to create technical trust in executors. Proper method of keeping account by executor trustees. Commissions in two capacities when not allowed .....	5
BAIER v. BAIER. Executor and trustee not allowed to resign because too busy to serve, especially where he has been sufficiently disengaged to draw his commissions .....	162
BANNING v. GUNN. When court without power to compel trustees to apply principal of fund to use of <i>cestui que trust</i> .....	337
BAYLIS, SMITH v. ....	30
BECKER v. LAWTON. Surrogate's court has ample power to adjust equities of case where executor is surviving partner of testator, and indebted to the estate .....	341
BEDFORD, BROWNE v. ....	304
BETHUNE, MATTER OF .....	392
BIBLE SOCIETY v. OAKLEY. Temporary administrator cannot demand judicial settlement of his account. Limited letters testamentary may issue, pending proceedings for revocation of probate .....	450
BILLINGS v. STEWART. Lien of execution creditor, on assets of decedent, not enforceable in Surrogate's court, unless receiver appointed, or order of disposition obtained, in debtor's lifetime .....	265
BLANCK v. MORRISON. Where one would be entitled, but	

	Page
for his infancy, to letters of administration, <i>c. t. a.</i> , his guardian must receive the appointment. unless disqualified by statute.....	297
BORDEN, JOHNSON <i>v.</i> .....	36
BOWNE <i>v.</i> LANGE. Surrogate's court has jurisdiction, in proceedings for judicial settlement, to determine whether a claim has been disputed or rejected by executor.....	350
BRENNAN <i>v.</i> LANE. Injunction. When court will refuse to forbid administrator to discontinue carrying on of intestate's late business.....	322
BRINK <i>v.</i> MASTERSON. When equitable conversion effected by will. Preference of legacy in lieu of dower. Effect of authority to executors to sell real property for benefit of legatees.....	524
BROWN, CARMAN <i>v.</i> .....	96
BROWNE <i>v.</i> BEDFORD. Surrogate's jurisdiction of claim for past maintenance of infant. Ratification of acts of administrator performed before receiving letters. When administrator may sell assets on credit.....	304
BUCKHOUT <i>v.</i> FISHER. Probate of will. Virtual acknowledgment of signature, by testator. Court may infer from circumstances that will bore testator's signature when presented to witnesses.....	277
BULL <i>v.</i> KENDRICK. Probate of will of non-resident decedent. When open commission allowed, to take deposition of non-resident subscribing witnesses. Infants, when deemed parties "adverse" to applicant.....	330
CANFIELD <i>v.</i> CRANDALL. Construction of will and codicil. Charitable bequests. Revocation of legacy by ineffectual provision in codicil.....	111
CARD, KINNAN <i>v.</i> .....	156
CARMAN <i>v.</i> BROWN. Sale of real estate. When creditor barred from procuring, by reason of extinguishment of his demand by the statute of limitations.....	96
CAMP <i>v.</i> FRASER. <i>Status</i> , on appraisal, of assets of partnership whereof decedent was a member. Requisites of decree for delivery of property, entered in discovery proceeding. Deponent under Code Civ. Pro., § 885, cannot be cross-examined.....	212

# TABLE OF CASES REPORTED.

v

	Page
CARR, LOCKWOOD v.....	515
CASE, MATTER OF.....	124
CENTRAL TRUST CO., SMITH v.....	75
CHEYNE, POSTLEY v.....	492
CHILDS, HAAS v.....	137
CLARK v. BUTLER. Interest on legacies, when allowed from testator's death, etc. Determination of claim accord- ing to foreign law. Transmission of assets to foreign representative .....	378
CLOSE v. SHUTE. Accounting in proceedings for sale of real estate not a judicial settlement. Attorneys who have procured a judgment to be recovered against administrators, on claim against decedent, may, by vir- tue of their lien on same, petition for judicial settle- ment, on the ground of their interest in the estate.....	546
COCHRANE v. WALKER. Legatee of life-annuity, payable out of income of residuary estate bequeathed in trust, is entitled to have arrearages of lean years paid out of after years that are full.....	164
COGSWELL, MATTER OF.....	248
COLLES, MATTER OF.....	387
COLLYER, MATTER OF .....	24
COLLYER v. COLLYER. Probate of will. Competency of tes- tator's declarations. Requisites of proof of factum of lost or destroyed will. Costs of unsuccessful propo- nents. Right of contestants to employ separate coun- sel .....	53
CORN v. CORN. Revocation of letters of administration, on ground of "false suggestion," not permissible unless latter was made to court which granted the letters. Agreement between administrators as to custody of assets.....	394
CRANDALL, CANFIELD v.....	111
CRUIKSHANK, STOLZEL v.....	352
DAYTON, RAYMOND v.....	333
DEARING, MATTER OF.....	81
DECKER, KNICKERBOCKER v.....	128
DE LAMATER v. McCASKIE. What "lien" sufficient to pre-	

	Page
vent examination in discovery proceedings. Extraordinary expense of uncontested probate.....	549
DERICKSON <i>v.</i> DERICKSON. Surrogate may annex, to appointment of general guardian of infant, a condition that access to latter be permitted, on the part of designated persons .....	295
DICKERSON <i>v.</i> STOKES. Payment of legacy. Interest on legacy to testator's debtor, and interest on the debt how adjusted.....	219
DUFFY, REILLEY <i>v.</i> .....	366
DUSENBURY, HALL <i>v.</i> .....	181
EGAN <i>v.</i> PEASE. Will having three subscribing witnesses admitted on testimony of one, and against that of the the remaining two.....	301
ELIAS, PUBLIC ADMINISTRATOR <i>v.</i> .....	139
FARMERS' LOAN & TRUST CO. <i>v.</i> HILL. Surrogate's court has no power to open decree, or grant new hearing, on mere ground of alleged error of law therein contained..	41
FERNBACHER <i>v.</i> FERNBACHER. Revocation of letters testamentary. Misconduct of executors in wasting assets. Construction of will bequeathing estate in trust, with remainder over. Stay on appeal.....	227
FISHER, BUCKHOUT <i>v.</i> .....	277
FISKE, TILDEN <i>v.</i> .....	357
FORST, SUSZ <i>v.</i> .....	346
FRAME <i>v.</i> WILLETS. When separate accountings proper where trustees hold several trusts under one will. Rule as to annual commissions on income. When objection to account insufficient .....	368
FRASER, CAMP <i>v.</i> .....	212
FRIDAY, KINTZ <i>v.</i> .....	540
FULLERTON, MACKAY <i>v.</i> .....	153
GAFFNEY <i>v.</i> PUBLIC ADMINISTRATOR. Discovery of assets. Savings bank deposits. Ownership determinable from pass-books, where no other evidence forthcoming.....	223
GOVE <i>v.</i> HARRIS. One asserting a right to present a will for probate must make out a <i>prima facie</i> case, demonstrating his <i>status</i> under Code Civ. Pro., § 2614.....	293

# TABLE OF CASES REPORTED.

vii

	Page
GUNN, BANNING <i>v.</i> . . . . .	387
HAAS <i>v.</i> CHILDS. Who should be appointed temporary administrator of decedent's estate, pending contest over probate of will upon issue of undue influence . . . . .	187
HALL <i>v.</i> DUSENBURY. Attorneys for one recovering judgment against administrator, not creditors of decedent by reason of their lien for costs. Effect of allegation of equitable set-off, in proceeding to compel payment of claim . . . . .	181
HAMERSLEY, JONES <i>v.</i> . . . . .	427
HANOVER <i>v.</i> REYNOLDS. Construction of stipulation for rendition of services by attorneys. Meaning of "disbursements." When attorneys not allowed to employ counsel at expense of estate . . . . .	385
HARDENBERG <i>v.</i> MANNING. Marshalling of assets of intestate, insolvent, non-resident decedent. Domiciliary creditor entitled to preference, under domiciliary statute, accorded same here, as to foreign assets . . . . .	437
HARRIS, GOVE <i>v.</i> . . . . .	293
HARRIS, MATTER OF . . . . .	463
HART, STEBBINS <i>v.</i> . . . . .	501
HAYWARD <i>v.</i> PLACE. What constitute assets of decedent's estate, for purpose of conferring jurisdiction on Surrogate's court. Priority of right to letters of administration with will annexed . . . . .	487
HEICHEL, SALOMON <i>v.</i> . . . . .	176
HENRY <i>v.</i> HENRY. Proof requisite on application for commission to examine non-resident as a witness. Status of party to probate proceeding, triable before other issues. Impeachment of marriage, or judgment of divorce. Stay on appeal . . . . .	253
HEUSNER, SCHMIDT <i>v.</i> . . . . .	275
HILL, FARMERS' LOAN & TRUST CO. <i>v.</i> . . . . .	41
HILL, QUIN <i>v.</i> . . . . .	69
HILL <i>v.</i> HORTON. Probate of will of lunatic. Where lunatic deemed to have been domiciled. Power of committee to establish domicil . . . . .	88
HOLM, PORTEUS <i>v.</i> . . . . .	14
HOME FOR INCURABLES, WARDLOW <i>v.</i> . . . . .	473

	Page
HORTON, HILL <i>v.</i> .....	88
HOUSMAN, MATTER OF.....	404
HUTCHINSON, MOORHOUSE <i>v.</i> .....	362
JENKINS, MEAD <i>v.</i> .....	84
JENKS, RUGG <i>v.</i> .....	105
JOHNSON <i>v.</i> BORDEN. Appointment of general guardian of non-resident infant. Confined to property, where for- eign guardianship of person already exists. When father's claims disregarded.....	36
JOHNSON <i>v.</i> JOHNSON. Laws of this State govern, as to con- trol of trust funds situated here, though beneficiaries are non-resident, and custodian is acting under ancil- lary letters. Jurisdiction to revoke ancillary letters of general guardianship .....	93
JONES <i>v.</i> HAMERSLEY. By whom, and under what circum- stances, a Surrogate may be called upon to construe disposition of personal property by will, upon applica- tion for probate.....	427
JONES <i>v.</i> M. E. S. SCHOOL. Charitable bequests. Legacy to society valid, though incompetent to take at testa- tor's death, provided it be incorporated and capable of receiving when legacy vests .....	271
KENDALL, MATTER OF.....	133
KENDRICK, BULL <i>v.</i> .....	330
KINNAN <i>v.</i> CARD. Construction of will. When "becoming entitled" refers to vesting in <i>possession</i> , as distinguished from <i>interest</i> . Meaning of "issue of child living at" testator's death. Apportionment act of 1875 construed.	156
KINTZ <i>v.</i> FRIDAY. When Surrogate's court cannot try issue as to alleged cancellation of debt owing to decedent. Widow's next of kin required to bring advancement into hotchpot.....	540
KNICKERBOCKER <i>v.</i> DECKER. Sale of real estate. When proceedings should be suspended, to enable petitioner to attack prior sale under foreclosure of mortgage.....	128
KRAUS, MATTER OF.....	217
KURST <i>v.</i> PATON. Construction of will, bequeathing re-	



# TABLE OF CASES REPORTED.

ix

	Page
mainder to "the children I may then have or those who may be legally entitled thereto".....	180
LANE, BRENNAN <i>v.</i> .....	322
LANE <i>v.</i> LEWIS. Non-resident alien may be removed from office as testamentary trustee, though he has never acted. Exaction of bond from successor appointed by decree of removal.....	468
LANGE, BOWNE <i>v.</i> .....	350
LAWTON, BECKER <i>v.</i> .....	341
LEINKAUF, MATTER OF.....	1
LEWIS, LANE <i>v.</i> .....	468
LOCKWOOD, PHILLIPS <i>v.</i> ...	299
LOCKWOOD <i>v.</i> CARR. Inquiry into the jurisdiction of other courts. What determinable on reference of disputed claim. Marshalling of partnership and individual assets .....	515
LONG, OLMSTED <i>v.</i> .....	44
LORETTA, LYNCH <i>v.</i> .....	312
LUSSEN <i>v.</i> TIMMERMAN. Grant of letters of administration. Non-resident male preferred to resident female. Disposition of applications for principal and ancillary letters .....	250
LYNCH <i>v.</i> LORETTA. Bequest to member of religious order. No presumption that same was made in trust for the society, and therefore void under the statute of 1848 ..	312
MCCASKIE, DE LAMATER <i>v.</i> .....	549
MACKAY <i>v.</i> FULLERTON. Restrictions upon Surrogate's power to remove testamentary guardian. Distinction between such case and that of other general guardian of infant.....	153
MANNING, HARDENBERG <i>v.</i> .....	437
MASTERSON, BRINK <i>v.</i> .....	524
MATTER OF BETHUNE. Intervention of party in proceedings to prove will. Impeachment of marriage as void <i>ab initio</i> .....	392
MATTER OF CASE. Alleged will refused probate, for failure of witnesses to subscribe at end.....	124
MATTER OF COGSWELL. Legacy and succession tax act of	

## TABLE OF CASES REPORTED.

	Page
1885 not applicable to bequest vesting before date of its passage.....	248
MATTER OF COLLES. Settlement of account of executor of will of non-resident decedent. Conflicting laws as to amount of commissions.....	387
MATTER OF COLLYER. Settlement of account of administrator. Savings bank deposits. Surrogate's jurisdiction to determine validity of trusts. When decedent, depositor, held to have created trust as to principal of deposit, only .....	24
MATTER OF DEARING. An executor, whose letters have been once revoked, can never be reinstated in office ...	81
MATTER OF HARRIS. Apportionment of executorial commissions. Effect of statute changing rate. Surviving partner of decedent, also executor, entitled to no commissions for winding up firm business.....	463
MATTER OF HOUSMAN. Apportionment of fire insurance premiums between beneficiaries, under will, for life and in remainder. Adjustment of rights in respect to chattels retained by trustees, and deteriorating by use.....	404
MATTER OF KENDALL. Respective rights of tenants, for life and in remainder, under will bequeathing residuary estate in trust, without directions to keep property <i>in specie</i> .....	133
MATTER OF KRAUS. Power of Surrogate's court, as to requiring filing of a referee's report, or payment of his fees..	217
MATTER OF LEINKAUF. At what stage of special proceeding special guardian may be appointed. Rules governing commissions of executors who are also constituted trustees by testator's will.....	1
MATTER OF NEWMAN. Legacies "in government bonds" held to be neither specific nor demonstrative. Legatee's election to take bequest in money.....	65
MATTER OF REYNOLDS. Probate of will. Will executed by testator, by making cross, cannot be proved on testimony of one subscribing witness, and proof of handwriting of the other who is dead.....	68
MATTER OF ROBERT. Construction of will. Meaning of "indebtedness" to testator. Effect of reference, in	

# TABLE OF CASES REPORTED.

xi

	Page
will, to extraneous papers. Distinction between papers executed before, and those executed after will.....	185
MEAD v. JENKINS. Surrogate has to decide whether his proceedings are stayed by appeal from the Supreme court judgment reviewing his decree. General undertaking in \$500 stays proceedings under decree for sale of real estate, upon appeal to court of appeals from judgment modifying such decree.....	84
MEAD v. WILLOUGHBY. An executor is entitled to object to account of co-executor, though destitute of personal interest. Status of attorneys of executors, as objectors.	364
M. E. S. SCHOOL, JONES v.....	271
MEYER, O'REILLY v.....	161
MOORHOUSE v. HUTCHINSON. Removed testamentary trustee when not compellable to pay income to <i>cestui que trust</i> . Insufficiency of answer to petition to compel trustee to pay claim .....	362
MORGAN, QUINTARD v.....	168
MORGAN, ROBERT v.....	148
MORGAN v. MORGAN. Liability of trustees employing trust funds in their own business. Rate of interest. Commissions when not forfeited by official irregularities. .	353
MORRISON, BLANCK v.....	297
MORSE v. SCOTT. Will rejected, as being the offspring of an insane delusion respecting the perpetual conservation of decedent's physical remains.....	507
MULLER, SAUTER v.....	389
NEWMAN, MATTER OF.....	65
NORTON v. SILLCOCKS. Requisites of petition, by father of infant, for decree directing application of income of trust created by will of mother, towards support and education of beneficiary.....	145
OAKLEY, BIBLE SOCIETY v.....	450
OLMSTED v. LONG. Disposition of real property of decedent. Provisions of Code as to opening decrees and granting new hearings construed. Requisites of alleged newly discovered evidence .....	44

	Page
O'REILLY <i>v.</i> MEYER. Executors will not be encouraged to keep unintelligible accounts, by making of extra allowance to their counsel on accounting, for services necessitated by such delinquency.....	161
PATON, KURST <i>v.</i> .....	130
PEASE, EGAN <i>v.</i> .....	301
PHILLIPS <i>v.</i> LOCKWOOD. Temporary guardian, on retiring from office at instance of ward, entitled to commissions on principal fund handed over to successor.....	299
PLACE, HAYWARD <i>v.</i> .....	487
PORTEUS <i>v.</i> HOLM. Probate of will. Virtual acknowledgment of signature by testator. Attestation clause containing untrue recitals nugatory. Testimony of interested witness discredited.....	14
POSTLEY <i>v.</i> CHEYNE. When executors' circumstances deemed to afford adequate security for due administration. What is an "office within the State, for the regular transaction of business in person." Who entitled to custody of trust funds.....	492
PUBLIC ADMINISTRATOR, GAFFNEY <i>v.</i> .....	223
PUBLIC ADMINISTRATOR, SUTTON <i>v.</i> .....	33
PUBLIC ADMINISTRATOR <i>v.</i> ELIAS. When public administrator, seeking to discover concealed assets, is governed by the Code, and not by the Revised Statutes. What "answer" insufficient to prevent examination of respondent.....	139
PULLMAN <i>v.</i> WILLETS. Administrator not allowed to charge for use of his own property or means in service of decedent's estate. Objectionable counsel fees.....	536
PURDY, YOUNG <i>v.</i> .....	455
QUIN <i>v.</i> HILL. Funeral expenses. Who under obligation to incur. Reimbursement of payer. Counterclaim against executor's liability to make payment of amount due legatee, pursuant to decree.....	69
QUINTARD <i>v.</i> MORGAN. Who is a "principal" legatee. Among different claimants of letters of administration, <i>c. t. a.</i> , the one having greatest interest in estate should be selected. Joinder of person not entitled....	168

# TABLE OF CASES REPORTED.

xiii

	Page
RAYMOND v. DAYTON. Executor not allowed counsel fees, in respect of the performance of duties incumbent upon himself, personally.....	333
REILLEY v. DUFFY. Mere appearance of interest sufficient to sustain an application to compel judicial settlement of account of executor or administrator.....	366
REYNOLDS, HANOVER v.....	385
REYNOLDS, MATTER OF.....	68
ROBERT, MATTER OF.....	185
ROBERT v. MORGAN. Jurisdiction of referee, upon trustees' accounting. What is a sufficient "objection" to an account. When witness not punishable for contempt for refusal to answer question before referee.....	148
RUDD v. RUDD. Jurisdiction of Surrogate. Court has no power to determine issue between claimant of income of trust fund, alleged to be indebted to estate, the existence of both debt and income being disputed.....	335
RUGG v. JENKS. Punishment for contempt. When executor not liable thereto for failure to obey decree directing payment of legacy.....	105
SALOMON v. HEICHEL. Appraisal invalid, unless previous notice posted. What a sufficient answer to petition for summary payment of judgment debt. Effect of omitting publication of notice to creditors to present claims....	176
SAUTER v. MULLER. Bequest for life, with remainder over, vests subject in remainderman on death of testator, where prior beneficiary dies before that event.....	389
SCHMIDT v. HEUSNER. Next of kin of intestate, who has assigned his distributive share, has a standing as an applicant for the filing of an inventory, where he assails the assignment as void for fraud in its procurement....	275
SCOTT, MORSE v.....	507
SHUTT, TAYLOR v.....	528
SHUTE, CLOSE v.....	546
SILLCOCKS, NORTON v.....	145
SMITH v. BAYLIS. What issues cannot be tried on administrator's accounting. When court will open decree. Conflicting claims to distributive share.....	30
SMITH v. CENTRAL TRUST Co. Attorney's lien on his client's	

	Page
cause of action, etc., does not exist in respect to special proceedings in a Surrogate's court. When issue, arising upon attorney's claim for compensation, not triable in such court.....	75
STANLEY v. STANLEY. Revocation of letters of administration. Conflicting claims to <i>status</i> of widowhood. Meretricious cohabitation deemed to continue such.....	416
STEBBINS v. HART. Effect of declarations of decedent, as evidence in probate proceedings. Proof of undue influence. Release of interest by legatee, to temporary administrator, renders him competent to testify, for proponent, as to communications with decedent.....	501
STEWART, BILLINGS v.....	265
STOKES, DICKERSON v.....	219
STOLZEL v. CRUIKSHANK. Effect, on will nominating executors, of codicil making different nomination, without express revocation .....	352
SUSZ v. FORST. Petition for removal of executor when sustained as sufficient, though informal in its allegations. Jurisdiction not impaired by denial of respondent.....	346
SUTTON v. PUBLIC ADMINISTRATOR. Non-resident alien cannot procure letters of administration through power of attorney. Duty of county treasurer to apply for letters in certain cases of death in his county. Construction of statutes .....	33
TAYLOR v. SHUTT. Contest between estates of deceased co-executors. When executor not liable for <i>devastavit</i> committed by co-executor.....	528
TILDEN v. FISKE. Resignation of testamentary trustee. What deemed "sufficient reason" therefor. Effect of testamentary provision for cases of resignation.....	357
TIMMERMAN, LUSSEN v.....	250
VAN VLECK, ADAMS v.....	343
VOGEL v. ARBOGAST. Court will not interfere, at instance of legatees, etc., with performance by executors or administrators in making appraisal and inventory of decedent's assets.....	399

# TABLE OF CASES REPORTED.

xv

	Page
WALKER, COCHRANE <i>v.</i> .....	164
WARDLOW <i>v.</i> HOME FOR INCURABLES. Construction of will. Validity of charitable bequest. Implied abrogation of statute.....	473
WILLETS, FRAME <i>v.</i> .....	368
WILLETS, PULLMAN <i>v.</i> .....	536
WILLOUGHBY, MEAD <i>v.</i> .....	364
YOUNG <i>v.</i> PERDY. Judicial settlement of account of testa- mentary trustee. Adjustment of rights of legatee in- debted to estate on account of moneys borrowed from trustee. Surrogate has no jurisdiction to reform as- signment.....	455





## NAMES OF DECEDENTS AND WARDS.

---

	Page
Arbogast, Philip . . . . .	399
Bacon, Daniel P. . . . .	5
Baier, John . . . . .	162
Bedford, Henry A. . . . .	304
Berry, Charles W. . . . .	337
Bethune, John C. . . . .	392
Blanck, Aaron P. . . . .	297
Brennan, John . . . . .	322
Brown, Harry . . . . .	96
Buck, Elizabeth . . . . .	468
Bull, Henry C. . . . .	330
Busching, Catherine . . . . .	346
Case, Mary C. . . . .	124
Childs, Solomon . . . . .	137
Clark, Mary S. . . . .	378
Cogswell, William L. . . . .	248
Colles, James . . . . .	387
Collyer, Elizabeth . . . . .	24, 53
Conner, Denton F. . . . .	473
Corn, Abraham . . . . .	394
Crandall, John . . . . .	111
Dearing, Thomas . . . . .	81
Decker, Nicholas H. . . . .	128
Delaplaine, John F. . . . .	352

# **xviii NAMES OF DECEDENTS AND WARDS.**

	Page
Derickson, Sue, <i>et al.</i> , <i>wards</i> . . . . .	295
Dickie, Patrick . . . . .	343
Duffy, Charles . . . . .	366
Dusenbury, Thomas . . . . .	181
Elias, Ellis H. . . . .	139
Fernbacher, Wolf . . . . .	227
Fisher, Thomas . . . . .	277
Fraser, John H. . . . .	212
Gates, Phebe W. . . . .	540
Gilbert, Elizabeth . . . . .	468
Gray, Charles B. . . . .	515
Hamersley, Louis C. . . . .	427
Harris, Henry . . . . .	463
Harris, Rachel . . . . .	293
Havens, Hiram H. . . . .	549
Heichel, Theodore . . . . .	176
Henry, James G. . . . .	253
Hill, John S. . . . .	41, 69
Hill, Mary . . . . .	88
Housman, Sarah A. . . . .	404
Hutchinson, Hiram . . . . .	362
Jenkins, John P. . . . .	84
Johnson, Milbank, <i>et al.</i> , <i>wards</i> . . . . .	36, 93
Jones, John W. . . . .	271
Kendall, Isaac C. . . . .	133
King, Annie C., <i>et al.</i> , <i>wards</i> . . . . .	153
Kinnan, Alexander P. W. . . . .	156
Kraus, Julia . . . . .	217

# NAMES OF DECEDENTS AND WARDS.      xix

	Page
Kurst, John . . . . .	130
Lange, William H. . . . .	350
Leinkauf, Donah . . . . .	1
Lussen, Gesche . . . . .	250
Lynch, Margaret . . . . .	312
McFarlan, Hudson . . . . .	528
Mack, Egbert B. . . . .	385
Masterson, Jacob D. . . . .	524
Morgan, Charles . . . . .	168
Morgan, Lucinda L. . . . .	148, 353
Morrison, John C. . . . .	164
Mull, Jane . . . . .	341
Newman, Amos . . . . .	65
Norton, Frances S. . . . .	145
Olmsted, Charles . . . . .	44
O'Reilly, John . . . . .	161
Pease, Clara E. . . . .	301
Phillips, Carrie L. . . . .	299
Place, Susan A. . . . .	487
Rabel, Anthony . . . . .	455
Reynolds, Philip . . . . .	68
Riley Fanny . . . . .	333
Robert, Christopher R. . . . .	185
Rowland, Stephen S. . . . .	437
Rudd, George . . . . .	335
Rugg, Jonathan G. . . . .	105
Sammons. John S. . . . .	507

## **xx NAMES OF DECEDENTS AND WARDS.**

	<b>Page</b>
<b>Sauter, Agnes</b> . . . . .	<b>389</b>
<b>Schmidt, Andreas</b> . . . . .	<b>275</b>
<b>Schaffer, Catharine</b> . . . . .	<b>14</b>
<b>Shuit, Morgan</b> . . . . .	<b>528</b>
<b>Shute, Gilbert</b> . . . . .	<b>546</b>
<b>Smith, Anne</b> . . . . .	<b>30</b>
<b>Smith, Mary</b> . . . . .	<b>223</b>
<b>Stanley, Marcus C.</b> . . . . .	<b>416</b>
<b>Sterling, Alexander F.</b> . . . . .	<b>492</b>
<b>Stewart, Joseph B.</b> . . . . .	<b>265</b>
<b>Stokes, James</b> . . . . .	<b>219</b>
<b>Taylor, James W.</b> . . . . .	<b>528</b>
<b>Tilden, William</b> . . . . .	<b>357</b>
<b>Underhill, Elizabeth R.</b> . . . . .	<b>75</b>
<b>Voorhis, Ann</b> . . . . .	<b>450</b>
<b>Wild, James</b> . . . . .	<b>33</b>
<b>Willets, Manuel</b> . . . . .	<b>586</b>
<b>Willets, Samuel</b> . . . . .	<b>368</b>
<b>Willoughby, Mary</b> . . . . .	<b>364</b>
<b>Wilson, John</b> . . . . .	<b>501</b>

REPORTS OF CASES  
ARGUED AND DETERMINED  
IN THE  
SURROGATES' COURTS  
OF THE  
STATE OF NEW YORK.

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WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,  
SURROGATE.—September, 1885.

MATTER OF LEINKAUF.

*In the matter of the judicial settlement of the account  
of HERMAN J. LEINKAUF, and others, executors of,  
and trustees under the will of DONAH LEINKAUF,  
deceased.*

- The provision of Code Civ. Pro., § 2330, requiring a Surrogate to appoint a competent and responsible person to appear, in a special proceeding, as special guardian for an infant party who does not appear by his general guardian, is properly complied with upon the return day of the citation. An earlier application by an infant cited, for such an appointment in his own behalf, is premature.

Executors, who are also constituted trustees by their testator's will, cannot have commissions, in both capacities, at one time, upon one fund.

Where a will creates a trust in the executors, directing them to sell and convert the property, invest the proceeds, and apply the income to the use of designated beneficiaries, and their account is presented for settlement before completion of the performance of their executorial duties, only half commissions can be allowed upon proceeds of sale in their hands, the other half being awardable when those duties, with respect to the fund, are terminated, and the accounting parties enter upon the discharge of their functions as trustees.

## 2 CASES IN THE SURROGATES' COURTS.

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### MATTER OF LEINKAUF.

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ON September 3rd, 1885, upon the petition of the executors, citations, returnable the 30th day of the same month, were issued for a final accounting in this matter. On September 23rd, a petition was filed by Daniel M. Cohen, a half brother of Bertha Leinkauf, and two other children of decedent, all under fourteen years of age, on whom the citation had been served, praying for the appointment of Daniel P. Hays as their special guardian in this proceeding, alleging him to be a competent, responsible and disinterested person.

DANIEL P. HAYS, *for petitioners.*

THE SURROGATE.—The application, if proper, is premature. Section 2530 of the Code provides that “where a party, who is an infant, does not appear by his general guardian, . . . . the Surrogate must appoint a competent and responsible person to appear as special guardian for that party.” Although these minors had no general guardian when this petition was presented, yet it was possible for them to have one on or before the return day of the citation. As they are residents of the city and county of New York, the Surrogate of that county could have made such appointment without the knowledge of it coming to this court. Should he have done so, that general guardian can appear for them on the return day of the citation. It seems, therefore, that this court should refrain from appointing a special guardian, in any case, until the return day of the citation.

Application denied.

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MATTER OF LEINKAUF.

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Upon the accounting, it appeared that the testatrix, by her will, gave and devised all her estate, real and personal, to her executors, in trust, to sell and convert into money, and, after the payment of her debts, to invest \$10,000, and pay or apply the income thereof to her husband for life, said fund upon his death to fall into her residuary estate. The residuary estate was to be divided into separate and equal shares, and invested for the benefit of each child: for the sons until they attained to a certain age, and for the daughters for life, remainder to the issue, etc. The executors and trustees accounted in 1877, and again in 1882. Upon the last accounting, a small balance of the capital of the estate, amounting to about \$150, was found to be in their hands, which the decree directed them to hold under the provisions of the will. The bulk of the real property was sold in July, 1885, for upwards of \$52,000, out of which the debts, amounting to over \$26,000, were subsequently paid. The fund of \$10,000 for the benefit of the husband had not yet been invested, nor had the residuary estate, as directed by the will. The executors and trustees now claimed commissions in both capacities.

J. H. K. BLAUVELT, *for executors.*

THOMAS W. BUTTS, *guardian ad litem for infants.*

THE SURROGATE.—It seems to me that the very title of this matter indicates that double commissions cannot now be allowed. The Court of Appeals, in *Johnson v. Lawrence* (95 N. Y., 154), says, after re-

#### 4 CASES IN THE SURROGATES' COURTS.

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##### MATTER OF LEINKAUF.

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viewing the adjudged cases on the subject, they appear to establish that, "to entitle the same persons to commissions as executors and trustees, the will must provide, either by express terms or by fair intendment, for the separation of the two functions and duties, *one duty to precede the other and to be performed before the latter is begun.*" Now the title indicates, what the facts seem to disclose, that the executors have not fully performed their duties, else they could not be accounting as such now. By her will, the testatrix gave and devised all her estate, which consisted chiefly of real property, to her executors, in trust, to sell and convert, and, after payment of debts, to invest the proceeds for lives and for years. The last accounting was had in 1882, and since that time the bulk of the real property, and all that remained, has been sold; and it is in regard to that, chiefly, that this accounting is now had. It does not appear that any separation of the fund has as yet been made by the executors, and no direction for such separation has been made by the decree of this court, as this is the first accounting since the sale of the bulk of the real property. As the whole of the real property has now been sold, a final accounting of the executors can be had, and the amount of each child's share be ascertained; and the decree can discharge them as executors, and direct them to invest and hold such shares as trustees.

I do not understand how they can embrace in one account an intermingled statement of their proceedings, both as executors and trustees. But, conceding that they are constituted trustees by the will, and



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BACON V. BACON.

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had they heretofore, as such, invested the \$10,000 for the benefit of the husband, they might render a separate account as to that fund, and a separate one as to the balance of the estate, which they still held as executors. These would, however, be distinct proceedings, in one of which they would be entitled to commissions as trustees, and in the other as executors.

They are now entitled, as executors, to full commissions on the amount of capital received since the last accounting, provided their executorial duties are here terminated: if not, they can have only half commissions now, and the other half when those duties shall be ended, and they enter upon those of trustees. They cannot have double commissions at the same time on the same fund.

As the facts are understood, no commissions can be now allowed to the executors as trustees. Those must be fixed on the next accounting by them as such.

Decreed accordingly.

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WESTCHESTER COUNTY.—HON. OWEN T. COFFIN, SUR-  
ROGATE.—October, 1885.

BACON v. BACON.

*In the matter of the judicial settlement of the account of CHARLES A. BACON, and others, executors of, and trustees under the will of DANIEL P. BACON, deceased.*

The description, by a will, as "trustees," of persons thereby nominated to execute its provisions, does not constitute them such, unless trusts are

## 6 CASES IN THE SURROGATES' COURTS.

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### BACON V. BACON.

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created for them to perform; while, on the other hand, where the instrument creates such trusts, its failure so to describe such nominees will not deprive them of that character.

A provision, in a will, for *qualification* by persons therein designated "executors and trustees," negatives the inference of an intention to constitute a trust, in the technical sense of that word.

Where executors have completed the performance of their duties as such, and are about to enter upon the discharge of functions imposed upon them as trustees under the will, their account should be fully and finally closed, and a sum, fixed and certain, set apart for them to hold in their new capacity, free from all charges.

Testator, who died in 1879, by his will, which nominated his wife executrix, and three other persons executors thereof, after bequeathing certain general legacies, which were made payable as soon as convenient after his decease, gave the residue to the executors, other than the wife, in trust for the benefit of the latter for life, with power to sell the real property—remainder over. This was the only provision for the widow, and was expressed to be in lieu of dower, thus entitling her to the income from the death of testator. It was further provided that, in case any of the trustees named died, resigned, or omitted to qualify and act, the other or others should select successors or substitutes, who were to have like powers, *upon qualifying*. In 1882, a decree was entered settling the executors' account, allowing them full commissions on the *corpus* of the fund, and, though not discharging the executors, directing them to pay over, to such of their number as were named trustees in the will, the residue of the estate, to be administered in accordance with the provisions of that instrument. The will, however, contained no such direction. The widow having died in February, 1885, the surviving executors again submitted their account for settlement and asked to be again allowed full commissions, as trustees, upon the principal fund.—

*Held*, that the will created no separate trust, the terms, "executors" and "trustees," being therein employed, except as regarded the widow, interchangeably and as synonymous; that the effect of the decree of 1882 was merely to carry out the intention of the testator to place the residue in the hands of the executors other than the widow; and that the commissions asked for should not be allowed.

Johnson v. Lawrence, 95 N. Y., 154—followed; McKie v. Clark, 3 Dem., 380—approved.

THE testator, Daniel P. Bacon, died in December, 1879, leaving a will, whereby he disposed of an estate amounting to about \$250,000, of which about \$225,000 consisted of Government bonds, bonds and mortgages and stocks. After giving legacies to his

children and grandchildren, amounting to about \$63,000, payable as soon after his decease as might be, he gave all the residue of his estate to his executors, other than his wife (who was afterwards named as executrix), in trust, for the benefit of his wife for life, with remainder over. This provision for his wife was in lieu of dower. He also authorized his executors or trustees to sell his real estate. He also provided that, in case either of the trustees named should omit to qualify and act under the will, or die or resign, the remaining trustees or trustee were to appoint a successor or successors; and gave to such successor or successors the same power to appoint successors or substitutes, conferring upon each successor or substitute the same power that the original trustees possessed under the will, on their qualifying and taking upon themselves the execution of the powers and duties conferred and imposed by the will.

In March, 1882, an account was filed by the executrix and the executors named in the will, by which it appeared that they had paid general legacies and interest thereon, amounting to about \$64,500—of which about \$52,000 was paid in 1880, and the balance in 1881, previously to May 12th, and that they had paid the widow, on account of income, about \$27,000; that they commenced making such payments to the widow within a few days after the testator's death, and continued to make them nearly every month, down to a month or two before filing the account. The executrix, as well as the executors, signed all of the schedules showing these payments, and all the other schedules. A decree was entered in

that proceeding, fixing the amount of the balance in the hands of the executors at \$169,775.06, which included \$100.25 of income. The sum allowed them for commissions was \$8,582.43, of which \$919.79 was to be deducted from the income. It was also adjudged that they had overpaid to the widow \$819.54, which sum it was directed that she should repay to the executors, or that the same be deducted from her future income. The costs and expenses of the proceeding, fixed at \$274.14, were directed to be paid out of the principal of the estate, and the executors were directed to pay over and deliver to the persons named as trustees, all the remainder of the estate, to be administered by them according to the provisions of the will. There was no provision discharging the executors, as such. The widow died in February, 1885. Some of the real estate remained unsold. The funds of the estate chiefly remained invested in the same securities held by the testator in his lifetime. No separate account was opened by the executors as trustees, and items which were now charged in the present account were received by them before the entry of the decree, in 1882.

There were some minor facts which sufficiently appear in the opinion.

MARSH, WILSON & WALLACE, *for executors and trustees.*

JOHN H. PECK, *for J. B. Bacon, legatee.*

THE SURROGATE.—While there are diverse and apparently conflicting elements that enter into and somewhat embarrass the consideration of the most

important question involved, yet the difficulty disappears when the facts are properly weighed, and well established rules applied. The executrix and executors having had commissions in full, on the accounting in May, 1882, the surviving executors now, as trustees, claim full commissions again on the same fund. This is objected to by the contestant, and his objection seems, under the adjudged cases, to be well taken. The designation of persons named to execute a will as "trustees" does not constitute them such, unless the will creates trusts for them to execute; nor does the failure to so designate them deprive them of that character, where the will does create such trusts.

In order to ascertain the intention of the testator, we must take into consideration the whole will and all its parts. While some expressions used in the will in question seem to indicate that it was the intention to make the executors trustees of the residuary estate, they appear to be overborne by others which imply a different intent. For instance, he appoints his wife executrix, and three gentlemen executors, and, after giving some general legacies, he gives to his executors thereafter named, other than his wife, all the rest, residue and remainder of his estate, to have and to hold the same in trust for the benefit of his wife for life. Standing alone, this would seem to create what the courts call a trust. But when we proceed further, and discover that it is the only provision made for the wife, and was in lieu of dower, and find that her right to her legacy accrued and commenced at the death of her

husband; that the general legacies were payable as soon after the death of the testator as was convenient; that the will provided for the appointment of successors to the persons named as trustees, and substitutes for such successors, and required them to "qualify," which, of course, means to take the usual oath of office, we are led to the belief that it was not intended to create a trust, but that the words executors and trustees were used interchangeably and as synonymous, except as to the executrix, whose powers were limited to duties which were exclusive of those affecting the provisions made for her personally.

In the case of *Johnson v. Lawrence* (95 *N. Y.*, 154), the court, after reviewing the various cases on the subject, deduces and establishes this general rule: "Taking the adjudged cases together, they appear to establish that, to entitle the same persons to commissions as executors and as trustees, the will must provide, either by express terms or by fair intendment, for the separation of the two functions and duties, *one duty to precede the other and to be performed before the latter is begun.*" Now, where shall we look for the period or point of separation of the two alleged duties in this case? In truth, they are interwoven and co-existent. The account filed in 1882 discloses the fact. In that account were mingled debts and legacies paid, and income to the amount of about \$27,000 paid to the widow, thus embracing executorial acts and those claimed to have been performed as trustees, in the same account. The funds of the estate were of such magnitude, and of such a nature, that the executors could have set aside suffi-

cient to meet the legacies, and thus ascertain quite accurately the amount of the residuum. This, perhaps, was done, and thus the duties of the executors, including the widow, and of the executors, excluding her, seem to have been discharged *pari passu*, and yet no such actual separation appears to have been made. The effect of this is to establish the fact that the testator did not intend to create two separate and distinct duties, "one duty to precede the other and to be performed before the latter is begun."

Then, again, the testator makes provision for the appointment of *successors* to those designated as trustees. This shows that he did not contemplate a trust that would attach to the persons of the executors rather than to the office,—a circumstance upon which much stress was laid, and the decision mainly hinged, in the case of *Hall v. Hall* (78 *N. Y.*, 535). Besides, there was a provision that such successors or substitutes for successors should "qualify." Executors qualify; trustees do not. Nor were the executrix and executors directed, by the will, to pay over to the executors named as trustees, the residuary estate (*Valentine v. Valentine*, 2 *Barb. Ch.*, 430). There was no actual investment of the alleged trust fund, as such, but it was invested from the beginning, and the securities representing it were embraced in the account rendered by them as executors, and in the account now rendered. Taking these facts together, and applying the principles settled by the authorities cited, it must be held that the accountants are executors only, and not trustees.

It seems, however, that there is another element in

the case to be considered. By the decree of May, 1882, the executors were directed to pay over to the executors who are named in the will trustees, all the remainder of the estate, to be received by them and administered in accordance with the terms and provisions of the will. There was no provision discharging the executors. The will contained no direction to the executors to pay over to the alleged trustees; and as the testator used the words executors and trustees interchangeably, the effect of the decree is only to carry out the intention of the testator to place the *residuum* in the hands of the executors other than his wife. The views of Surrogate ROLLINS on this point, as expressed in McKie v. Clark (3 *Dem.*, 380), seem to be sound.

It may not be out of place to state that the decree was entered without opposition, and without having the attention of the court directed specially to the subject. By that decree, it appears that a balance of upwards of \$169,000 was found to be in the executors' hands; they were allowed commissions to the amount of about \$8,580, and about \$275, costs. In the present account, the executors begin by charging themselves with the above \$169,000, then with items of money received by them before the filing of the first account; and, among other things, they credit themselves with the commissions and the payment of the costs—thus running the two accounts into each other. This is not, perhaps, very objectionable on the theory that both accounts are rendered as executors, but decidedly so, on the theory that they are trustees. If their duties as executors were then to



cease, and those of trustees to begin, their accounts should have been fully and finally closed, and a sum, fixed and certain, should have been set apart, which they were to hold in their new capacity, free from all charges.

It results from these views that, while the executors have had full commissions on the *corpus* of the fund once, they have no right to them, or any part of them again. It has been heretofore held (*Hawley v. Singer*, 3 *Dem.*, 589) that this court has the power, in this mode, of correcting an error in this respect, inadvertently made; but they would be entitled to commissions on the increase since the last accounting, and paid to the widow, as directed by the will, had they any balance of income due to her, from which they could be taken. If they chose, they could, at the time of each payment made to her, have reserved their commissions thereout. Whatever balance is on hand, which belonged to her, may be applied in that way.

Some real estate in Troy, which was bought in by the executors under foreclosure proceedings, has been since sold by them for \$15,000, a small part of which has been paid, and the residue is secured by bond and mortgage. This mortgage must be regarded as an investment made by them, of money on hand, and they should, if they have not heretofore received them, be allowed half commissions for receiving. Commissions on income received since the death of the widow, at the proper rate, must be allowed. The executors are obliged to do their duty in collecting it down to the time of the accounting and decree (*Haw-*

## 14 CASES IN THE SURROGATES' COURTS.

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PORTEUS V. HOLM.

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ley v. Singer, *supra*). Some choses in action, for rents and produce sold, are outstanding and uncollected; when they shall be paid, they will enter into any subsequent accounting which may be rendered.

I have thus endeavored to dispose of all the questions raised. Should anything have been omitted, it can be determined at the time of settling the decree. Costs to be adjusted, are allowed to both parties out of the fund.

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WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,  
SURROGATE.—November, 1885.

PORTEUS v. HOLM.

*In the matter of the application for probate of a paper propounded as the will of CATHARINE SHAFER, deceased.*

It must be deemed a settled doctrine in this State, that—where a testator produces a paper to which he has already personally subscribed his name, and *exhibits the same so subscribed* to another, with a request that the latter sign it as a witness, at the same time declaring it to be his last will and testament,—he virtually acknowledges his signature, and effects a due publication, as to such witness, within the meaning of the statute of wills (2 R. S., 63, § 40).

*It seems*, that, where an attestation clause intervenes between the proper provisions of a will and the sole subscription of the testator's name, such subscription may be regarded as made "at the end of the will," so as to satisfy the requirement of the statute in this particular.

An attestation clause, which contains a conceded misstatement of fact as to one subscribing witness to a will, and not a word of which was read by, or to the other, cannot be resorted to by a proponent, to prop up a case weakened by the frailty of the witnesses' memory, respecting the formalities of execution.

*It seems*, that it is not essential to show that a request, made by a decedent, to a subscribing witness to an alleged will of the latter was, in terms, to sign *as a witness*, where the circumstances warranted such an interpretation of the request.

Upon an application for the probate of a paper propounded as the will of decedent, it appeared that there were several blank spaces in the body of the instrument, large enough to permit the insertion of disposing clauses without interlineation, and, at the end, for the signature of decedent, and the date of execution. Decedent's name, with the suffix, "Adm'x," was subscribed only once, viz.: at the end of an attestation clause, which recited that the testatrix subscribed in the presence of each witness, and in such presence declared the instrument to be her last will. The only credited testimony, relative to publication, was that of the two subscribing witnesses, of whom the first testified that decedent came to his store, and presented to him the paper, so folded that he could see no part of the writing except the last line of the attestation clause, to wit, "our names hereto as witnesses this                      day of                      1882," which he did not read, and asked him to "witness her signature," which she wrote in his presence, and then departed, expressing the intention of visiting the other witness for a like purpose. The second witness recognized his signature as genuine, but recollected nothing.—

*Held*, that probate must be refused, for want of proof of an acknowledgment, by decedent, to the first witness, of the testamentary character of the instrument.

The testimony, in favor of the proponent of a contested will, given by one named as a legatee therein—weighed, and found wanting in credibility.

A PAPER, intended for a last will and testament, was prepared and came into the hands of the decedent at some time in 1882. There were several blank spaces in the body of it, sufficiently large to permit the writing of disposing clauses without interlineations, and a space at the end of the paper for the signature. Spaces were also left for the insertion of the day, month and year, which remained unfilled. Then followed an attestation clause, thus: "Subscribed by the testator in the presence of each of us, and at the same time declared by her to us to be her last will and testament, and thereupon we, at the

request of the testator, sign our names hereto as witnesses this                      day of                      1882.”  
which was signed

“ Catharine Shaffer, adm’x.

J. M. Dearborn, Mt. Vernon.

John Berry, Mt. Vernon, N. Y.”

The paper so executed was propounded for probate by Charles F. Holm, one of the persons named as executors therein. John Berry, one of the witnesses, testified that decedent came into his store with a paper in her hand, so folded that he could see no part of the writing, except the last line of the attestation clause, “and asked me if I would witness her signature, and she made her signature in my presence and asked me to witness it,” which he did; and then she said she must go in to see Mr. Dearborn and get him to do the same thing. Mr. Dearborn’s store was a few doors from Mr. Berry’s, and he was not present when the paper was signed by Mrs. Shaffer. Berry could not remember that Mrs. Shaffer said it was her last will and testament, but if she had, thought he would have remembered it. Mr. Dearborn, the other witness, had no recollection whatever on the subject, but admitted the genuineness of his signature. Both of them had acted as witnesses to a will of the decedent in 1878, the circumstances attending the execution of which they recollected. Subsequently, Mary A. King, a servant of the decedent, to whom a legacy of \$200 had been given by the alleged will, testified that she accompanied the decedent to the stores of the respective witnesses, and that the decedent substantially asked Mr. Berry if he would sign her will

and testament, to which he assented; that she and the decedent then went to Mr. Dearborn's store, and asked him to sign her will.

CHAS. F. HOLM, *in person*, and ISAAC N. MILLS, *of counsel*.

JACOB FROMME, *for George W. Shaffer, husband*.

CHAUNCEY SHAFFER, *for Louisa Porteus and another, heirs*.

J. H. M. PORTER, *for Kate M. Penrose, heir*.

W. M. SKINNER, JR., *guardian ad litem for infant heir*.

THE SURROGATE.—The contestants insist that the will was not properly executed, taking the statements of Mrs. King to be true, because the testatrix did not acknowledge her signature to Dearborn, one of the witnesses, who did not see her sign her name, and cite, on this point, the case of *Mitchell v. Mitchell* (16 *Hun*, 97). There “the deceased came into the store where the two witnesses were, and handed out a paper, and said: ‘I have a paper that I want you to sign.’ One of them took the paper and partly opened it, and saw what it was. The witness, probably, from his testimony saw the signature. The testator said ‘this is my will; I want you to witness it.’ Then the two witnesses signed the paper under the attestation clause. It does not appear that the other witness saw the testator’s signature. The testator then took the paper and said: ‘I declare this to be my last will and testament.’ At the time of this transaction, the paper had the name of the deceased at the end of the paper. But the witnesses did not

see him sign, nor was there any acknowledgment by him of his signature in their presence, unless the facts above stated are such acknowledgment." The court held that there was no acknowledgment of the signature to either of the witnesses, and rejected the will. This decision was affirmed in 77 *N. Y.*, 596, but by a divided court.

In *Chaffee v. Bapt. Miss. Conv.* (10 *Paige*, 85), the testatrix, who had subscribed the will by making her mark, but not in the presence of the attesting witnesses, "afterwards, and in their presence, placed her finger on her name and said: 'I acknowledge this to be my last will and testament.'" It was held that the will was not well executed. This is approved in the case of *Willis v. Mott* (36 *N. Y.*, 486). It is difficult to see any distinction between the case of the putting of the finger upon the name with the mark, and declaring it to be her last will and testament, and that of a presentation of a paper with the testatrix's signature written by her at the foot of it, with a declaration that it is her last will and testament. I am satisfied, on the whole, that the decision in the case of *Mitchell v. Mitchell* required that more should be done than merely requesting the witnesses to subscribe their names to a paper with the name of the alleged testator at the end of it, which he says is his last will and testament. By doing so, he complies with only two of the three distinct requirements of the statute. The other one, that he shall sign it in their presence, or acknowledge that he has signed it, is equally distinct and imperative with the others, and, in the absence of proof that he did one or the

other, the requirements of the statute have not been complied with, to render it a valid testamentary act. But, in the case of *Baskin v. Baskin* (36 *N. Y.*, 416), it was held to be a sufficient acknowledgment of the testator's signature where he produces a paper, to which he has personally affixed his name, and requests the witnesses to attest, and declares it to be his last will and testament, and that, in so doing, he does all that the law requires. This doctrine seems to be distinctly affirmed in the *Matter of Will of Phillips* (98 *N. Y.*, 267). (Curiously, it appears from the Surrogate's report of the case, in 3 *Dem.*, 459, that the testator *did* acknowledge his signature to both the witnesses, Skinner and Beach, during his conversation with each of them. And see *Rumsey v. Goldsmith*, 3 *Dem.*, 494). Hence, although the reasoning of Judge LEARNED, in the case of *Mitchell v. Mitchell*, may seem the stronger, the result reached in 98 *N. Y.*, is controlling here, and, assuming that the paper was executed and properly attested in the presence of one witness, and presented to the other so executed, and attested by him, then, if the testimony of Mrs. King is to be regarded as true, it might be held that it was well executed as a will.

But I am unable to bring my mind to a belief of her credibility. She and Mr. Berry are in conflict, as to their statements of the transaction. He is one of the leading business men in Mount Vernon; a man of character, intelligence, and large experience in affairs; and the same may be said of Mr. Dearborn; while Mrs. King had, for many years, been a servant, a part of the time, in the family of the deceased;

could neither read nor write; and was named as a legatee in the alleged will, to the extent of \$200. Mr. Berry's statement of the circumstances is, substantially, this—The deceased came to his store alone, and asked him if he would witness her signature, to which he assented. She then produced a paper so folded that only one line of the writing could be seen, to wit, "our names hereto as witnesses this day of \_\_\_\_\_, 1882," and of which he did not read a word, and signed her name. He signed his, and thinks she requested him to write his place of residence after it, which he did. She then said she must go and get Mr. Dearborn to do the same thing, and left his store. There was nothing said by her, to impress his mind with the fact that it was an important document. He thinks if she had said it was a will he should have remembered it. She was there only two or three minutes. Under these circumstances, it seems to me highly improbable that he was informed of the nature of the instrument, and it was not at all unlikely that a person unfamiliar with the manner of the execution of a will, as the deceased was, as is shown by her signing her name at the foot of the attestation clause, and appending to it the abbreviation, "adm'x," should have omitted to state what the paper was, especially in her anxiety to conceal its contents, as manifested by her.

Mr. Dearborn, the other witness, had no recollection of the matter whatever, but recognized his signature, which was written above Mr. Berry's, apparently for lack of room below it, and, although he



knew both Mrs. Shaffer and Mrs. King, he did not remember ever seeing them in his store together.

After the lapse of a month from the examination of these witnesses, Mary A. King was produced as a witness, and was objected to as incompetent, because named as a legatee, to testify concerning any transaction or communication between herself and the deceased. Her examination, however, was conducted in such a manner as to avoid the objection. She testified only to conversations in which she took no part, and which had no relation to any transaction between her and the deceased. She was engaged in cleaning house for the deceased, when the latter asked her to go with her to Mr. Berry's store, as she wanted to see him. It was but a short distance to the store, and was, as she states, between two and three o'clock in the afternoon. It strikes me as a singular proceeding for a lady to take a servant from her work at that hour, to accompany her, for no apparent reason. She says she went into the store with deceased, "and she shook hands with Mr. Berry, and asked him if he would sign her will and testament." He asked her if she were going to die, and she said, 'no.' Then he said, 'I will sign it.' So he went with her up to the desk." She says they were there twenty or twenty-five minutes (Mr. Berry says not more than two or three), and she, witness, was buying ruffling for deceased. They then went to Mr. Dearborn's, where deceased "asked him to sign her will, and he kind of laughed, and asked, 'have you come with the will?' and she said, 'certainly.'" They then went back to the desk, while the witness bought some salad dress-

ing. They were at Dearborn's twenty-five or thirty minutes. This witness, when asked to whom she had communicated these facts, for some time insisted that she had told them to no person whatever, but, after much questioning, admitted that she had, to her lawyer; who proved to have been not hers but her son's, but she claimed that he was her lawyer in this proceeding. She finally, after denying that she had done so, acknowledged that she had also told them to another counsel in the case. Taking into consideration all the facts detailed—the material interest which the witness has at stake, evidenced by her having engaged counsel to look after it, her alleged recollection of conversations, which, had they occurred, would have so impressed the minds of the intelligent gentlemen who signed the paper, that they would not have been readily forgotten, and who, after much reflection, are unable to recall anything of the kind, leads me to place no credence in the testimony of Mrs. King.

It is a pregnant and important fact that Mr. Berry and Mrs. King differ very materially, in reference to what both profess to recollect well. The former says the deceased requested him to *witness her signature*; the latter says she asked him to *sign her will and testament*. Both statements cannot be true. One witness is surely in error, and I feel constrained to believe Mr. Berry. Mrs. King professes to give all of the conversation, and she does not state that Mrs. Shaffer requested Mr. Berry to witness her signature. The two statements are conflicting and cannot be reconciled; nor can one be taken as evidence of a pub-

lication, and the other of a request to sign as a witness, thus, together, making a valid execution. According to her evidence, neither of the witnesses was asked by the deceased to sign her will *as a witness*. That, perhaps, was not essential, provided the circumstances warranted the inferring of such request. But, relying upon the testimony of Mr. Berry, it must be held that there was no publication of the instrument as a will, and it must, therefore, be rejected.

No reference has been made to the attestation clause, as an aid in the solution of this matter, as it was manifestly untrue as to one of the witnesses, and the other one declares that he did not read a word of it. . . . .

The evidence supplied by the attorney who drew the will, the object of which was to show that the deceased knew the character of the paper, and which was objected to as incompetent under § 835 of the Code, has been disregarded by me as wholly immaterial. The deceased was an intelligent lady, and it can hardly be assumed that she did not know the nature and contents of the paper she took to Mr. Berry's store; besides, such knowledge is shown, on her part, by the testimony of Harry Skidmore.

An order must be entered, denying probate of the paper offered as a will, with costs to proponents and contestants out of the fund, to be taxed.

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MATTER OF COLLYER.

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WESTCHESTER COUNTY—HON. OWEN T. COFFIN,  
SURROGATE—Nov., 1885; *again* May, 1886.

MATTER OF COLLYER.

*In the matter of the judicial settlement of the account  
of CHARLES S. COLLYER, as administrator of the  
estate of ELIZABETH COLLYER, deceased.*

The administrator of decedent's estate included in his inventory, and proposed to account for, as assets of that estate, seven items consisting of sums deposited in savings banks, and entered upon the pass books as follows :

" Bank Book No. ———, ————— Bank, in account with " (decedent) "in trust for A. B. . . . . \$ —————." The *cestuis que trustent* were not parties to the accounting proceeding, and did not ask leave to intervene, but an attorney in their behalf filed objections, of which the purport was a contention that those sums were not assets, and that the court had no jurisdiction to try and determine the question of the validity of the trusts.—

*Held*, that, the parties in interest not being before the court, their rights could not be adjudicated ; that, for the same reason, the objections, as such, must be disregarded ; but that, the court having received notice of the claims, the decree should direct the administrator to retain funds to meet the exigencies of any actions which might be brought and prosecuted in a proper forum.

In the same matter, the inventory and account presented a similar item of deposit, in trust for G., a party to the special proceeding, and one of decedent's next of kin, who was not aware of the existence of the deposit until after decedent's death, and in whose behalf similar objections were interposed.—*Held*,

1. That the court had jurisdiction to try and determine the question of the validity of the trust, since, without such determination, the amount of the distributive share of each of the next of kin could not be fixed as required by statute (Code Civ. Pro., § 2743).
2. That such deposit *prima facie* created a trust in favor of the specified beneficiary, the presumption becoming conclusive by reason of the absence of proof of contemporaneous circumstances sufficient to change the character of the transaction.
3. That, decedent having been shown to have ceased, after a certain period,

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MATTER OF COLLYER.

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to draw interest on the deposit, she must be deemed to have abandoned the subsequently accruing interest to the donee of the principal.

*It seems*, that, where such a deposit is made, and the depositor draws interest from the first, continuously, as it accrues, during life, it is manifested that the original intention was to become trustee of the principal of the fund only.

Dubois v. Brown, 1 *Dem.*, 317—adhered to ; Martin v. Funk, 75 *N. Y.*, 134 ; Mable v. Bailey, 95 *id.*, 266—followed.

It appeared, from the account filed in this matter, that the administrator included, among the assets for which he proposed to account, the amounts contained in several savings bank pass books, which were entered upon those pass books as follows :

“ Bank book No. 449.056, Bowery Savings Bank in account with Elizabeth Collyer, in trust for Willie Beckwith. \$819.09.”

There were six other items of similar pass books of several savings banks, with different sums “ in account with Elizabeth Collyer, in trust ” for six other Beckwith children, who were nephews and nieces of the decedent, and one other such item in favor of William S. Beckwith, her brother in law. These items were objected to, as not being assets of the estate, but as held by the administrator as trustee for the several nephews and nieces, and the brother in law, named in the books, respectively, and it was contended that this court had no jurisdiction to try and determine the question of the validity of such trusts.

DENNIS McMAHON, for Geo. B. Collyer :

Cited Martin v. Funk (75 *N. Y.*, 134) ; Mable v. Bailey (95 *id.*, 206).

ABRAM B. HAVENS, and HENRY L. COLLYER, for Wm. A. Collyer and others, next of kin, and the Beckwiths.

SEAMAN MILLER, and E. WELLS, for administrator.

THE SURROGATE.—Mrs. Beckwith is a sister of the intestate, and the mother of Willie Beckwith and the other children, for whom the alleged trusts were created. She is a party to this proceeding, but her children and her husband are not. Hence this court has no jurisdiction over them. They have not asked leave to intervene and be made parties. They have, through their attorney, filed some objections to the account, but, as objections, they must be disregarded, while they may be considered as a notice of their respective claims, and may be deemed sufficient to warrant a direction in the decree, to the administrator, to retain a proper sum to meet the exigencies of any actions, brought in a proper forum, for the recovery of such claims.

Those items, therefore, must be considered as stricken from the account.

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THERE also appeared, in the account of the administrator, as a charge against him in the amount of the inventory, an item which was thus stated in the latter :

“Elizabeth Collyer in trust for George B. Collyer, Bowery Savings Bank book, No. 329,357; amount, with interest, to Jan. 1, 1883, \$2,589.84.”

The entry on the pass book was as follows :

“Jan. 18, 1870, Elizabeth Collyer in trust for George B. Collyer, \$2,000.”

George B. Collyer, one of the next of kin of decedent, contended that the amount of such deposit and interest belonged to him, and objected that the same

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MATTER OF COLLYER.

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did not belong to the estate of the decedent, and was not subject to distribution on this accounting. Thereupon evidence was taken, touching the ownership of the same. The most material facts were that the decedent and said George were brother and sister, both single, then and for a long time prior thereto residing together, and that, on the same day on which said deposit was so made, the decedent deposited a like sum in her own name, and that the savings bank paid the highest rate of interest (6 per cent) on \$2,000 and under, and 5 per cent. on sums over that amount. The like deposits of small sums of money in savings banks, in her own name, in trust for several nephews and nieces, above mentioned, were made by decedent at about the same time. George had no knowledge of the deposit in trust for him until after her death.

THE SURROGATE.—It was objected, on behalf of George B. Collyer, at the commencement of this controversy, that this court had no jurisdiction to try and determine the question as to the validity of the alleged trust; but as it was considered that the amount of the distributive share of each next of kin could not be fixed by the decree as required by statute, without such determination, the objection was overruled. The transaction is not in the nature of a claim of a creditor against the decedent, but rather resembles the case of a gift *causa mortis* (Fowler v. Lockwood 3 Redf., 465). If there was a valid trust, it only terminated with the death of its creator. I had occasion to discuss the power of Surrogates' courts on this subject in DuBois v. Brown (1 Dem., 317).

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MATTER OF COLLYER.

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The administrator, in his account, charges himself with the amount of the deposit in question, and were it not for the objection interposed by George B. Collyer, who insists that it belongs to him and not to the estate, it would be distributed among the next of kin. The next of kin, other than he, also insist that it belongs to the estate. Under the authorities cited, there can be no doubt it is not to be regarded as a part of the assets of the intestate. The facts in the case of *Martin v. Funk* (75 *N. Y.*, 134) were very similar to those existing here. The entry in the pass book was of the same character and in the same form, and it was held that a valid trust was created. These facts, in addition, appear here, to wit, that sums of \$2,000 and under, drew interest at the rate of 6 per cent., while sums in excess of that amount, only 5 per cent.; that the deceased had \$4,000 to deposit at the same time, one half of which she deposited to her individual credit, and the other half to her credit in trust for her brother. But these circumstances cannot, of themselves, be regarded as sufficient to change the character which the law stamps upon the act. They do not show that she did not intend to create a trust for the benefit of her brother George. The case of *Mabie v. Bailey* (95 *N. Y.*, 206) fully sustains the doctrine laid down in the former. Such a deposit as was made in this case, *prima facie* creates a trust, and is conclusive upon the subject, unless contemporaneous facts and circumstances are shown, which would be sufficient to change the character of the transaction. This is precisely what the court seemed to have held in *Mabie v. Bailey*. An oppor-



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MATTER OF COLLYER.

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tunity was afforded here, to show such facts and circumstances, and as none were established, with perhaps a single exception, to which reference will be briefly made, the sum in question, with certain interest, must be excluded from the calculation in making distribution.

It seems that the decedent drew the interest on the trust deposit, the first time it became payable, and for several years consecutively. The interest so drawn out is not here claimed by the *cestui que trust*, and therefore no question is raised upon that subject; but I am inclined to think that, had she continued to draw such interest from the commencement down to the time of her death, that very fact, regarded as a part of the *res gestæ*, would indicate that she intended to constitute herself trustee of the principal fund only. Of course, she could not have drawn the interest at the time she made the deposit, but she availed herself of the very first opportunity to do so, and the act might fairly be considered as relating back to and characterizing the original intention in making the deposit, and the fact of her continuing to draw it regularly during her life, would tend to strengthen the idea. Here, however, she ceased for several years to receive it, and the fair inference from that omission is that she intended to abandon it to her said brother from that period.

The decree of distribution will be prepared accordingly.

SMITH V. BAYLIS.

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WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,  
SURROGATE.—November, 1885.

SMITH *v.* BAYLIS.

*In the matter of the estate of ANNE SMITH, deceased.*

*It seems, that a Surrogate's court has no power to try and determine the question—whether there has been a breach of a contract, made by one not a party to the proceedings, to assign a judgment against one of the distributees of an intestate's estate, subject to its jurisdiction—where a contest arises as to the proper method of disposing of such distributee's share.*

Upon a judicial settlement of the account of the administrator of decedent's estate, a decree was rendered in July, 1884, whereby the distributive share therein of J., a son of the intestate, against whom proceedings supplementary to execution were then pending before the county judge of Queens county, was fixed at \$212, which the administrator was directed to retain, subject to the order of a judge or court having jurisdiction in the premises. The supplementary proceedings resulted in an order of the county judge directing the administrator to pay the share in question to the sheriff of that county. Thereafter, J. applied to the Surrogate's court to open the decree so rendered, and amend the same by directing said share to be paid to himself, producing evidence that the judgment against him had since been satisfied of record.—

*Held, that, the only obstacle to the payment, to J., of his distributive share being the judgment referred to, and the evidence of the satisfaction of that judgment being conclusive upon the Surrogate's court, petitioner's application must be granted.*

THEODORE F. BAYLIS and Jacob B. Smith, as administrators of the estate of decedent, in April, 1884, instituted a special proceeding, for the judicial settlement of their account, as such. During the progress of the accounting, it appeared that one Nathaniel W. Husted, nearly twenty years ago, obtained a judgment against John B. Smith, one of the next of kin

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SMITH V. BAYLIS.

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of decedent, for about \$50. The judgment was recently docketed in Queens county, where he resided, and execution issued thereon. In June, 1884, supplementary proceedings were commenced, which resulted in an order, made by the county judge of that county, directing the administrator, Theodore F. Baylis (who held the funds), to pay the share of said John B. Smith to the sheriff of that county, to be applied by him as therein directed.

The proceedings on that accounting resulted in a decree directing the distribution of the assets among the next of kin, except the share of said John B. Smith, amounting to about \$212, which the administrator, Baylis, was directed to hold, subject to the order of a judge or court having jurisdiction in the premises. Subsequently, N. W. Husted the plaintiff in the judgment, died intestate, and it now appeared, in this proceeding, that the judgment had been satisfied of record. John B. Smith then presented an application, alleging the fact, in substance, that no claim existed against his share, and that the administrator, Baylis, still had the fund in his hands, and asked that the decree of 1884 be so modified as to direct said administrator to pay the same to him.

L. C. PLATT, *for petitioner.*

WM. F. PURDY, *for administrator.*

THE SURROGATE.—Proof was offered by the administrator, Baylis, tending to show that N. W. Husted, for a valuable consideration, had, in writing, sold said judgment and agreed to execute a satisfaction piece

thereof, or to assign the same as he might be requested, and that, after his death, his administrator had been requested to assign it to one Laurie. No such writing was produced, and the petitioner objected to parol evidence of its contents. Of course, the evidence was incompetent, if the writing were in existence and capable of production. The attorney for the administrator alleged that he had it at his office. Hence the objection was a good one, and there is no competent evidence before me on the subject.

The petitioner produced evidence of the satisfaction of the judgment. This is deemed conclusive here. Even if proper evidence of the agreement to assign it had been produced, this court would have no power to try and determine the question, whether there had been a breach of the contract to assign it. The administrator of N. W. Husted is not a party to this proceeding, and no decision in reference to such contract could be made by this court which would bind him.

It is not apparent that the administrators of the estate of Anne Smith, deceased, have, or that either of them has, any interest in the matter, other than to pay the fund to the person legally entitled to receive it. It is not denied that Mr. Baylis still holds it. As the evidence stands, which shows that the judgment, which was the only obstacle in the way of directing payment of the share of John B. Smith to him, by the former decree, has been satisfied, that decree must be modified so as to direct the payment to be so made.

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SUTTON V. PUBLIC ADMINISTRATOR.

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WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,  
SURROGATE.—November, 1885.

SUTTON v. PUBLIC ADMINISTRATOR.

*In the matter of the application for letters of administration upon the estate of JAMES WILD, deceased.*

A non-resident alien, not being entitled under our statute (2 R. S., § 32), to a grant, by a Surrogate's court of this State, of letters of administration upon an intestate's estate, cannot, by a power of attorney, authorize another to procure what he is himself debarred from receiving.

The provisions of R. S., part 2, ch. 6, tit. 6, art. 2, entitled: "Of public administrators in the several counties of this State, other than the county of New York," were not repealed or otherwise affected by L. 1842, ch. 155, entitled: "An act in relation to coroners," and partly embodied in Code Crim. Pro., §§ 785-787.

Accordingly, where a man dies, from whatever cause, in this State, elsewhere than in New York or King's county, leaving assets amounting to \$100 or more, in the county where the death occurs, and there is "no widow or relative in the county, entitled or competent to take letters of administration on the estate," the county treasurer should proceed, as public administrator, to procure letters of administration, under the article of the Revised Statutes, above cited.

THE intestate was employed in the construction of the new Croton aqueduct, within the limits of Westchester county, and while so employed received an injury from which he soon died. A coroner's inquest was held over the remains, and the coroner found among the effects of the deceased a watch and some other personal property, among which was a bank pass book, showing a deposit to the credit of the intestate, in the Tarrytown National Bank, amounting to upwards of \$400. The assets so found were delivered by him to the treasurer of the county.

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SUTTON V. PUBLIC ADMINISTRATOR.

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It appeared, from a communication received by the coroner, that the only next of kin of intestate was Honora Wild, his mother, residing in the county of York, England. She transmitted to him a power of attorney, the execution of which was proved before a commissioner to administer oaths in the Supreme court of judicature in England, in and by which she empowered him to obtain letters of administration on the estate of the intestate, and generally to do whatever might be necessary to be done, to get in and administer said personal estate, as she might do if personally present. The coroner, George H. Sutton, applied for letters of administration accordingly.

**THE SURROGATE.**—The mother of the intestate, being a non-resident alien, cannot, under our statutes, obtain letters of administration herself, and she cannot authorize any one to do for her what she is precluded from doing. Were there none other, this would be a sufficient reason for declining to entertain the application.

The coroner, pursuant to the provisions of L. 1842, ch. 155, § 1 (Code Crim. Pro., § 785), delivered the valuable property and things on and belonging to the deceased to the county treasurer of Westchester county, who holds them under § 2 of that act (Code Crim. Pro., § 786), which provides that he shall, as soon as may be practicable, convert them into money and place the same to the credit of the county; and if demanded within six years thereafter by the legal representatives of the person on whom the same were found, he shall, after deducting the expenses incurred

by the coroner, etc., pay the balance thereof to such legal representatives (*id.*, § 787). Now, it is alleged that the deceased was an unmarried man, and left no next of kin or relatives in this country. Hence, the county treasurer, as public administrator, by virtue of the provisions of 2 R. S., 129, § 47, was authorized to take possession of the property, and proceed in reference thereto, as authorized and directed to do by the article of which that section is a part. That section provides that, where a person shall have died intestate, leaving assets in the county, amounting to over one hundred dollars in value, upon which no letters of administration have been granted, and there is no widow or relative within the county, entitled or competent to take such letters, the public administrator shall take charge thereof and proceed as provided in said article.

All the conditions, therefore, exist which are requisite to invest the public administrator with power to act under the provisions of the R. S. Whether death resulted from apoplexy, heart disease, or the falling of a rock, can make no difference. In either case he died. The act of 1842 does not purport to be, in any of its provisions, amendatory of the R. S., nor to repeal any of them; and as repeal by implication is not favored, those statutes must be regarded as unaffected by the later act. It will be seen that, by the latter, there is no amount of assets or value of property on which the provision is limited, while by the former, the action of the public administrator is confined to those cases where such value shall exceed one hundred dollars. The object of the

act of 1842 may have been to cover those cases where the value was less than \$100, and which were theretofore unprovided for, although such object is not expressed.

Under the latter act, if the money realized be not called for by the legal representative within six years, it will remain in the county treasury and belong to the county, while, if taken possession of by the public administrator and administered by him, the balance remaining after such administration is to be delivered to the State treasurer, from whom it may be obtained by any one entitled thereto, through an order of the Supreme court to that effect.

It seems to me that, in this case, the county treasurer should proceed as public administrator, and thus the mother will, with least trouble, expense, and delay, be enabled to obtain what of right belongs to her.

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WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,  
SURROGATE.—December, 1885.

JOHNSON v. BORDEN.

*In the matter of the application of MILBANK JOHNSON,  
an infant, for the appointment of a general guardian.*

Code Civ. Pro., § 2822, prescribing the contents of a petition, by an infant of the age of fourteen years, or upwards, for the appointment of a general guardian of his person or property, or both, justifies the Surrogate's court of a county wherein property of a non-resident infant of the requisite age is situated, in entertaining such an application in his



JOHNSON V. BORDEN.

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behalf, independently of the law of any other state, or proceedings thereunder; although a regard to inter-state comity would suggest that, where a foreign guardianship of the person has been created and remains in force, the appointment should be confined to the property of the applicant.

A petition by an infant, under Code Civ. Pro., §§ 2822, 2823, for the appointment of a general guardian of his property, should mention the amount of property to which the infant is entitled within this State, so as to enable the court to fix the penalty of the official bond.

Where an infant of the age of fourteen years, or upwards, petitions for the appointment of a general guardian, and it appears that his father is a resident of a distant state, and that there exists such a feeling of antagonism between the two as to induce the belief that the petitioner's welfare will be best subserved by the appointment of another person, the claims of the father will be disregarded.

THE petition of Milbank Johnson showed that he was an infant, over fourteen years of age, residing at Elgin, in the state of Illinois; that he was entitled, under the will of Gail Borden, late of Westchester county in this State, deceased, to certain property situated in that county; that the petitioner's father, Jahu W. Johnson, was appointed his general guardian in Harris county, in the state of Texas, on or about December 7th, 1880, and that ancillary letters of guardianship were granted to the latter by the Surrogate of Westchester county, on December 17th, of the same year, and that said guardianship had expired by reason of said petitioner having arrived at the age of fourteen years; that his father resided in the state of Texas, and that his mother was dead; that two brothers of the petitioner, who were also wards of their father, on arriving at full age, were obliged to resort to legal proceedings against said guardian, to obtain their rights, and that he, the petitioner, had not confidence in said guardian's management or control of his property, or in his integrity as such guardian; and prayed

for the appointment of H. Lee Borden, of the city of New York, as his general guardian.

J. W. Johnson, father of petitioner, having been duly cited, filed an answer to the petition, in which he stated, among other things, that H. Lee Borden was a resident of Chicago, in the state of Illinois, and not of the city of New York, and that petitioner's legal residence was Houston, in the state of Texas; that he was by the laws of that state, the guardian of the person of said infant; that Borden was an improper person to be the guardian of the infant; and that he and the infant were adversely interested in the estate of Gail Borden, deceased. On these grounds, he opposed the appointment of Borden as guardian.

M. G. HART, *for petitioner.*

L. C. PLATT, *opposed.*

THE SURROGATE.—The courts of this State have always striven to carefully guard the property of minors, situated within their jurisdiction. Formerly, a person appointed guardian of an infant, in another state, was not entitled to receive from the executor or administrator here, the legacy or share of the infant (*Morrell v. Dickey*, 1 *Johns. Ch.*, 153; *McLoskey v. Reid*, 4 *Bradf.*, 335). Now, however, by §§ 2838, 2839 and 2840 of the Code of Civil Procedure, provision is made for the issuing of ancillary letters of guardianship to a guardian of an infant residing in another state, duly appointed in such state, where the Surrogate is satisfied that it will be for the ward's interest that such ancillary letters be issued. Such

letters authorize the guardian to remove the ward's property from this State.

By § 2828 of the Code, it is declared that the office of a guardian of a minor under fourteen years of age shall expire when the minor shall become fourteen. Conceding that the legal residence of the petitioner is in the state of Texas, the laws of that state provided that, when he becomes fourteen, he may choose his guardian (Rev. Stat., 1879, art. 2510). Hence, the petitioner could apply to the proper court there, for the appointment of such guardian. He is, therefore, free to make such application to any court, in any state, where, by law, it is permitted to him. In this State, it is provided, by § 2822 of the Code, that he may apply to the Surrogate's court of the county in which his property, real or personal, is situated, where none has been appointed by a court of competent jurisdiction of the State, for the appointment of a general guardian of his person and property, or either. It thus seems that this court may properly entertain the application of the petitioner.

Indeed, independently of the law of any other state, or proceedings under it, the section last referred to seems to confer such power on this court; but if the law of such other state clothed the guardian there appointed with power over the person of the ward until he attained the age of twenty-one years, doubtless, a due regard for inter-state comity, would prompt the court to confine the appointment here to a guardianship of the estate only; for it would be an anomaly to have two guardians of the

person, residing in different and widely separated states, while it may be perfectly proper in reference to property.

The petition seems to be defective in not stating the amount of property to which the minor is here entitled, so that the court may be enabled to fix the amount of the penalty of the bond. That defect, however, may be cured by supplying the needed proof. The place of residence of the proposed guardian, and his fitness for the office, seem to be questioned. Those are matters of detail, concerning which I will hear proof, unless some unobjectionable person shall be agreed upon. As the petitioner and the proposed guardian are said to have precisely similar interests, differing in degree only, in the estate of Gail Borden, it is not apparent how such interests are in conflict.

The father of the petitioner is a resident of a distant state, and while he might, notwithstanding that fact, be able to attend properly to the interests of the petitioner here, still, the papers before me disclose the existence of such a feeling of antagonism between them, as to induce the belief that the welfare of the petitioner will be best subserved by the appointment of some other person.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,  
SURROGATE.—December, 1885.

FARMERS' LOAN AND TRUST CO. V. HILL.

*In the matter of the estate of JOHN S. HILL, deceased.*

Notwithstanding the increased dignity of Surrogates' courts, which were constituted courts of record in 1877, they still remain tribunals of special and limited jurisdiction, and have no power, where a determination has been once made by them, to review it upon a pure question of law.

Code Civ. Pro., § 2481, subd. 6, which permits Surrogates' courts to open, vacate and modify their own decrees and orders, etc., was framed mainly in order to expressly confer upon those tribunals powers which it had been held that they incidentally possessed.

Matter of Accounting of Hawley, 100 N. Y., 206—explained.

It appeared from the petition in this matter, that the decedent, by his will, gave an annuity of \$5,000 to his wife for life, and that, after making several other pecuniary provisions for other persons, he gave the residue of his estate, to be held by Frances C. Hill, his widow, and Edward Petit, his son in law, who were named as executrix and executor, in trust, for the benefit of his two daughters, Isabella and Arabella, one moiety of the residue in remainder to go to the children of each, on the death of the mother; that said Arabella was married to a man by the name of Quin, and had died leaving two minor children, of whom the Farmers' Loan and Trust Company had been duly appointed the guardian, and said guardian now claimed that said moiety should be paid to it; that, since the death of Arabella Quin, and in June last, a decree was entered in this court, on an account there-

tofore filed by said executors, by which they were directed to retain, invest, and re-invest the whole of the residue of the estate, including said moiety, and to which accounting the petitioner was not a party; that the disposition of the estate, as fixed by the decree, was not in accordance with the direction of testator, as expressed in his will. The petitioner, the Farmers' Loan and Trust Company, as such guardian, therefore, prayed that the decree might be opened and amended so as to direct the payment to the petitioner of the moiety of the residuum, charged with the payment of one half the annuities provided by the will.

TURNER, LEE & MCCLURE, *for petitioner.*

RODMAN & ADAMS, *for executors.*

THE SURROGATE.—Counsel has submitted elaborate arguments as to the proper construction of the will of the deceased; it being urged, on behalf of the petitioner, that the will contemplated the payment of one half the residuum to the children on the death of the mother; and, in opposition, it being contended that the executors were legally directed, by the decree on the accounting, to retain the whole estate, in order properly to carry out the intentions of the testator. Hence, it is manifest that this court is asked to thus review a decision it has already made, upon a pure question of law. Counsel for the executors object that this cannot be done. The objection, in view of the decisions, *In re Tilden* (98 *N. Y.*, 434), and *Singer v. Hawley* (3 *Dem.*, 571), recently affirmed by the Court of Appeals (100 *N. Y.*, 206), seems to

be well taken. A copy of the opinion delivered by the latter court, in that case, has been furnished, with a view of showing that it was there held that every court of record has an inherent power over its own records, to modify, amend, and vacate them, independently of the special power conferred by statute. But that court holds no such doctrine. It simply says that *if* a court of record has such power, it belongs exclusively to the court whose records are in question, and cannot be exercised for it by an appellate tribunal. Subd. 6 of § 2481 of the Code seems to have been framed mainly to expressly confer upon Surrogates' courts the powers which, it had been already held by the courts, they incidentally possessed (*Sipperly v. Baucus*, 24 *N. Y.*, 46, and cases cited). There is, in the petition, no allegation of fraud, newly discovered evidence, clerical error, or anything of that character. The real allegation is that an error of law was committed in construing the will. Such an error, if it exist, this court has had no power conferred upon it to correct. It is still a court of special and limited jurisdiction, and has not, as I think, the broad power to deal with its records as to it may seem fit.

It is not denied that the proceedings, which led up to the decree in question, were strictly regular. All in interest were duly cited, and the minors were properly represented on the accounting. It is true, the petitioner alleges that it was not a party to the accounting, but it was not, at the commencement of the proceeding, the guardian of the minors, and those minors were properly cited, as the paper shows.

Motion denied, with ten dollars costs.

## 44 CASES IN THE SURROGATES' COURTS.

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OLMSTED V. LONG.

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WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,  
SURROGATE.—December, 1885.

OLMSTED v. LONG.

*In the matter of the disposition of the real property  
of CHARLES OLMSTED, deceased, for the payment  
of his debts.*

Power to grant a new trial or new hearing, for newly discovered evidence, which means a re-trial of the issues made by the pleadings, is the only really new power conferred upon Surrogates' courts, by Code Civ. Pro., § 2481, subd. 6, whereby a Surrogate, is permitted, in court or out of court, "to open, vacate, modify or set aside, or to enter as of a former time, a decree or order of his court; or to grant a new hearing for fraud, newly discovered evidence, clerical error or other sufficient cause."

Upon the principle that punctuation may be disregarded, where necessary, in construing statutes, the semicolon appearing in the subdivision quoted is to be deemed replaced by a comma; so as to confine the exercise of the powers specified in the former of the two clauses, to cases presenting one or more of the grounds mentioned in the latter.

Where the granting, by a Surrogate's court, of an application to open, vacate and set aside a decree thereof, would necessarily lead to a new trial or hearing,—as where the applicant relies chiefly upon allegations of fraud or newly discovered evidence,—the case is to be governed by the principles established respecting the grant of new trials, though a prayer for such relief is not contained in the petition.

The reasonable rule established by the superior courts, on a motion for a new trial, prevails, also, in Surrogates' courts, viz.: that alleged newly discovered evidence must be so clear and positive as to satisfy the mind of the court that, if offered pending the trial, it would have changed the result.

The question whether an attorney, who appeared for a party to a special proceeding in a Surrogate's court, which has been terminated by decree, was guilty of gross neglect to produce proper evidence on the hearing, is a matter between attorney and client, with which such court has nothing to do.

An application, made upon various grounds, to open and vacate a decree directing the sale of certain of decedent's real property for the payment of his debts—denied upon the merits.



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OLMSTED V. LONG.

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CHARLES OLMSTED died intestate in February, 1882. Letters of administration on his estate were duly issued to his widow, Rachel Olmsted, in March following. On March 28th, 1884, she rendered her account, as such, all persons interested in the estate having been cited to attend the same. From the account, it appeared that there were no assets of the estate left unadministered. A decree was entered accordingly.

Edward B. Long, claiming to be a creditor of decedent, then, on July 30th, 1884, made application to have the real property of decedent mortgaged, leased or sold for the payment of his debts. A copy of the account rendered by the administratrix was annexed to the petition. Cyrus Olmsted, one of the heirs at law of decedent, and Miles W. Olmsted, his son, and a grantee of some of the premises of which the decedent died seized, were, among others, cited to show cause why the prayer of such petition should not be granted. They both appeared, and said Miles W. Olmsted litigated the matter upon various grounds, but did not question the allegation, contained in the petition, to the effect that the personal estate had been duly administered, and was insufficient to pay the debts.

The chief ground of contention was in regard to the validity of the claims presented, and the amounts due thereon. Such proceeding resulted in a decree fixing the amounts due upon such claims, adjudging, among other things, that the administratrix had proceeded with reasonable diligence in converting the assets into money, and that such money was insufficient to pay the debts. The decree, entered in March,

1885, directed the mortgaging of certain premises, known as 335 Spring street, in the city of New York, to pay the debts established. In July following, a motion was made, on behalf of the Olmsteds, to re-settle the decree, which was, after hearing argument, denied. Subsequently, on notice to the parties interested, a motion was made, on behalf of the creditors, to modify the decree so that a sale of the premises should be made, as the money could not be raised on a mortgage; which motion was granted without objection, and the decree so modified.

Miles W. Olmsted now presented a petition in which he prayed to have the decree opened, vacated, and set aside, on the ground, as alleged, that certain assets of decedent, to wit, certain leases of decedent of certain premises in the city of New York, of a rental value nearly sufficient to pay such debts, together with a certain check of \$1,359, part proceeds of a sale in partition of the real estate of the Olmsteds which was directed by the Supreme court to be applied to the payment of the claim of said Long, and which was still applicable to that purpose, should be so applied. These leases, it was claimed, had been recently discovered. It was also alleged, as a ground of the application, that two of the creditors of the decedent were not made parties to the proceedings to mortgage, etc. The petitioner further prayed that the alleged assets might be first applied to the payment of the debts, before any part of the real estate was resorted to. Another ground for the relief asked was the alleged gross neglect and misconduct of peti-

tioner's attorney in that proceeding, in not bringing the facts stated to the knowledge of the court.

PETER MITCHELL, *for petitioner.*

M. M. SILLIMAN, *for Long, creditor.*

GUY C. H. CORLISS, *for C. K. Corliss, creditor.*

C. FROST, *for certain grantees.*

THE SURROGATE.—This is an application made under the provisions of subd. 6 of § 2481 of the Code, which declares that the Surrogate shall have power “to open, vacate, modify, or set aside, or to enter, as of a former time, a decree or order of his court; or to grant a new hearing for fraud, newly discovered evidence, clerical error, or other sufficient cause.” Applications under this subdivision are becoming very frequent, and it is, therefore, of much importance that an effort should be made to put a proper construction upon the sentence quoted. There would be no difficulty in this respect, were it not for the semicolon following the first clause. It would seem that that clause gives the power “to open, vacate, modify, or set aside, or to enter as of a former time, a decree or order” without any assigned cause for its exercise; and that then, by the latter clause, a new trial or a new hearing may be granted “for fraud, newly discovered evidence, clerical error, or other sufficient cause.” The first clause seems to have been based upon various decisions of the late Court of Chancery and of the Supreme court, and Court of Appeals, holding that a Surrogate had the power, although not

expressly conferred by statute, to *vacate and set aside* a decree or order which he had no jurisdiction to make (*Vreedenburgh v. Qalf*, 9 *Paige*, 128); to *open* a decree entered by default, in consequence of mistake or accident, depriving the applicant of a hearing (*Pew v. Hastings*, 1 *Barb. Ch.*, 452); to *modify* a decree by the correction of mistakes and *clerical errors*, the result of oversight or accident (*Sipperly v. Baucus*, 24 *N. Y.*, 46; *Campbell v. Thatcher*, 54 *Barb.*, 382); to *vacate* a decree for fraud (*Yale v. Baker*, 2 *Hun*, 468); and see *Strong v. Strong* (3 *Redf.*, 477, and cases cited; also Commissioners' note to the section).

Thus, before this section was enacted, it had been established that this court had power to open, vacate, modify or set aside a decree for "fraud, clerical error, or other sufficient cause," such as a want of jurisdiction, or an excusable default. In some of these cases, a further hearing would be had, as a necessary sequence. It would, therefore, seem that the only really new power conferred is to grant a new trial or new hearing for newly discovered evidence; which means a re-trial of the issues made by the pleadings. It is not apparent how there could be a new trial in regard to a "clerical error," which is usually to be found on the face of the papers—such as an error in placing or adding figures, etc. If the semicolon, whose office is to distinguish the conjunct members of a sentence, were dispensed with, and a comma substituted in its place, we should have a clearer conception of the meaning of the sentence (See *Matter of Accounting*

of Hawley, 100 *N. Y.*, 206). Courts will, if needful, disregard punctuation in construing statutes.

Here the application is made to open, vacate and set aside a decree duly entered, after a long litigation. A new trial or hearing, as such, is not asked for, but, according to the views expressed, such would be the result on granting the application, if the facts stated in the petition warranted the conclusion that evidence bearing upon the issues tried, or which an amendment of the pleadings would permit trying, has been discovered since such trial, or that the decree was obtained by fraud. No objection as to the regularity of the proceedings leading up to the decree has been taken, except that two of the creditors of the deceased had not been cited in the matter. Proof was furnished that one of them was duly cited, and as to the other, instead of there being any proof that he is a creditor, it appears from the account of the administratrix that he had been paid out of certain Fort Lee Park and Ferry stocks which he held as collateral; that the stocks had been sold, he paid, and the balance of the proceeds, amounting to about \$875, duly accounted for by the widow. A copy of the account which the administratrix, the grandmother of the petitioner rendered, was annexed to the petition in the proceeding to mortgage, etc. So that this petitioner then, and throughout the litigation, had a complete knowledge of what had been done by the administratrix, as such.

But he claims that he has recently discovered, solely on information and belief, that the deceased held some leases on real estate in the city of New

York, the net rental value of which is sufficient, with certain other available funds, to pay the debts established in this proceeding. Section 2755 of the Code provides that an heir or devisee of the property in question, or a person claiming under either, may contest the necessity of applying the property to the payment of debts, may contest the validity of any debt, and may interpose any defense to the whole or any part thereof. No defense was interposed by any person, of any character, except such as related to the validity and amount of the debts. It is not now shown that the petitioner or his father, who has made an affidavit touching the leases, ever saw any such leases, or any record thereof, nor are their contents made known. The father of the petitioner, and his grantor, was a witness on the stand in the chief proceeding, and testified to certain entries in a book kept by the deceased, with a view to establishing a payment on one of the claims then in litigation. The affidavit he now makes is to the effect that the same book contained an entry of the deceased in regard to these leases. It would thus seem that, if there are any such leases in existence, he possessed all the knowledge he ever had on the subject when that proceeding was pending, and the information of the petitioner in regard thereto was doubtless derived from his father. The allegations of the existence of any such leases rest wholly on information and belief, and are of such a character as not to warrant this court in opening the decree. There is no evidence showing that they were in force at the time of Charles Olmsted's death, or that he had not disposed of them

in his lifetime. The account rendered by the administratrix shows that she had no knowledge of them ; and Cyrus Olmsted was a party to that proceeding and interposed no objection. As the grantor, in possession of the intestate's book on which he says the entries were made relating to these leases, and which entries furnish all the knowledge he pretends to have on the subject, it was his duty, for the protection of himself and his grantee, to have raised the question now presented, when he had the book in his hand, and was testifying to other entries therein. A solemn adjudication, made after hearing all parties interested, cannot be disturbed on such uncertain evidence as is furnished, based mainly on information and belief. The evidence must be so clear and positive as to satisfy the mind of the court, that, if offered pending the trial, it would have changed the result. This is the reasonable rule established by superior courts, on a motion for a new trial. And here, a new trial would result, were the application granted on the ground under consideration.

If it be claimed that the administratrix was guilty of a fraud in not accounting for these leases, the answer is that there is no evidence whatever on which to base such a charge. There is no evidence to establish the existence of such leases as assets, as has already been stated, and if there were, there is no proof that she ever had any knowledge of them. To warrant the court in setting aside the decree for fraud, the evidence of the fraud must be clear and conclusive.

Another reason assigned for setting aside the decree

is that a check for some \$1,359, being part proceeds of a sale of lands in which the intestate had an interest, in an action for partition, was directed by the Supreme court, in which the action was pending, to be applied toward paying the claim of E. B. Long, the chief creditor. This check, Cyrus Olmsted states, in his affidavit, he has in his possession; how long he has had it does not appear. The first question which naturally arises is—why has it not been, and is it not now, applied to its designated purpose? With it, however, this court has here nothing to do. It is not pretended that it is assets of the intestate, over which this court has any control. Besides, the order of the Supreme court on the subject was made long after the commencement of the proceeding to mortgage, etc., and after the rights of the respective parties had come into existence. No order of that court could affect those rights then about to be ascertained and established; although it was, doubtless, competent for one to tender, and the other to receive, the check or the amount it represented.

The petitioner charges that his attorney was guilty of gross neglect in not bringing to the knowledge of this court the facts on which he now bases his claim for relief. That attorney ably and zealously contested the creditor's claims, and there is no evidence to show his knowledge of such facts. If he had such knowledge, he must have derived it from his client, and that would contradict the statement of the petitioner that he had "recently" himself discovered them. But this is a matter between attorney and client, with which this court has nothing to do.



COLLYER V. COLLYER.

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I can, therefore, discover no cause for granting the prayer of the petition, or in any way disturbing the decree in question.

The motion is denied, with ten dollars costs.

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WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,  
SURROGATE.—January, 1886.

COLLYER v. COLLYER.

*In the matter of the application for probate of a will  
of ELIZABETH COLLYER, deceased.*

*It seems*, that declarations of a decedent, as to the existence of a will, are competent, while those relating to its destruction by him are inadmissible, as evidence of the *factum*, in a special proceeding for probate.

But a declaration, made by a decedent, seven months before his death, to the effect that he had made a will of a certain character, does not rebut the presumption of its destruction, *animo revocandi*, arising from the fact that none could be found, after diligent search made soon after the death.

The *factum* of a lost or destroyed will must be established in the same manner as if the will itself were produced in court, for probate; *i. e.*, two, at least, of the subscribing witnesses, must be produced, or the non-production of one or both be satisfactorily accounted for, whereupon the fact that he or they attested the will must be proved by competent testimony.

*Colligan v. McKernan*, 2 *Dem.*, 421—distinguished.

Under Code Civ. Pro., § 1865, requiring that the provisions of a lost or destroyed will must be “clearly and distinctly proved by at least two credible witnesses, a correct copy or draft being equivalent to one witness,” one who produces and merely verifies an alleged draft of the will cannot be considered the needed additional witness, within the design of the rule; nor are declarations of the decedent, as to the contents and substance of the will, available as an equivalent thereto.

Upon an application for the probate of a will alleged to have been lost or destroyed, the only witness examined as to the *factum* was the lawyer

## COLLYER V. COLLYER.

who drew it, and who produced a draft containing neither the decedent's name, nor the names of the subscribing witnesses. He thought, though he was unable positively to swear, that he was a subscribing witness, but was unable to state who, besides himself, acted as such; thus rendering it impossible either to call the other witness, or, by accounting for his absence, to lay a foundation for proof of the fact that he signed in attestation.—

*Held*, that, on this ground, alone, probate should be refused.

An unsuccessful *proponent* of a will is not entitled to costs, as of right, under Code Civ. Pro., § 2558, subd. 3, which withdraws the allowance thereof, in certain cases, from the Surrogate's discretion,—that subdivision being, by its terms, confined exclusively to contestants.

Different contestants of a will have a right to employ separate counsel, to protect their several interests; and where they pursue such a course, it is in the Surrogate's discretion to award them separate bills of costs, which may, in a proper case, be charged personally against the *proponent*.

The history of the bestowal, and mode of exercise, of the power to take proof of lost wills of real and personal property—narrated.

ELIZABETH COLLYER died in March, 1883, leaving, as alleged, about \$70,000 of personal estate. After a fruitless search for a will of the decedent and on April 13th, of the same year, letters of administration on her estate were duly granted to her brother, Charles S. Collyer. On August 10th, 1885, the latter filed a petition for a judicial settlement of his account, to which George B. Collyer alleged, *inter alia*, as an objection, that the decedent left a last will and testament; and he subsequently filed a petition praying leave to prove the same as a lost or destroyed will. Thereupon, the proceedings on the accounting were suspended, until the result of such application should be determined. The evidence disclosed the facts that decedent, in 1863, executed a will, which was prepared by John E. Parsons, a counsellor at law, in the city of New York, the draft of which he produced and verified; that the engrossed copy, after

execution, remained in his custody for several years, and was delivered to decedent about the year 1877, in which year a folded paper was seen in her possession which she said was her will; that thereafter it was never seen by any one. By the draft which was produced, it appeared that she intended to give all her property, real and personal, to her brother, George B. Collyer, with whom she had lived for many years. There were declarations of decedent proved, subject to objection, to the effect that she had made such a will, and also declarations, subject to objection, that she had destroyed the same. She was a maiden lady, and left, her surviving, several brothers and sisters, besides said George B. Collyer, and others, who were her next of kin. Only one witness to the execution of the will was examined, and if there were any other subscribing witnesses, their names were not given, nor were they produced, nor their absence accounted for.

D. McMAHON, and F. LARKIN, *for proponent.*

SEAMAN MILLER, *for administrator.*

ABRAM B. HAVENS, EDWARD WELLS, and HENRY M. COLLYER, *for various next of kin.*

THE SURROGATE.—This proceeding was instituted with a view to proving the last will and testament of Elizabeth Collyer, deceased, as a lost or destroyed will. The power to take such proof, relating to a will of real estate, formerly resided solely with the Court of Chancery (*Bowen v. Idley*, 11 *Wend.*, 227; 6 *Paige*, 46). The proceeding was based upon the fact that jurisdiction was lacking in the proper eccle-

siastical courts and courts of law (1 Story Jur., § 440). In such a case, the court usually awarded an issue of *devisavit vel non* (Bowen v. Idley, *supra*), and required that, on the trial of such issue, all the witnesses to such will should be examined, if practicable, unless the heir should waive the proof (2 Story Eq. Jur., § 1447, and cases cited). So, under a bill to perpetuate testimony, the will could be proved in the Court of Chancery, by the examination of the witnesses, without proceeding to a decree (*id.*, § 1506). In no case did equity interfere to mitigate the severity, when any existed, of the rules of positive law (3 Bl. Com., 55). But by 2 R. S., 67, § 63, the Court of Chancery of this State was clothed with power to take proof of the execution of any will of real *or personal* estate, which was lost or destroyed, and *to establish the same*, as in case of lost deeds. By the next section, the decree establishing the will was directed to be recorded by the Surrogate, and the proper letters to be issued by him, as if the will had been proved before him. By § 67, no will could be allowed to be proved as a lost or destroyed will, unless proved to have been in existence at the time of the death of the testator; or shown to have been fraudulently destroyed in his lifetime; nor unless its provisions should be clearly and distinctly proved by at least two credible witnesses, a correct copy or draft being deemed equivalent to one witness. The R. S. (§ 40) required that at least two witnesses should subscribe a will of real and personal estate, or both, at the request of the testator; but, while § 12 required all the witnesses to a will of real estate, living in the

State and of sound mind, to be examined, by § 26 a will of personal estate could be proven by *one* or more of such witnesses. These provisions are all contained in the same title of the R. S., which conferred the power upon the Court of Chancery to take the proof of such wills lost or destroyed.

These being positive rules of law regulating the mode and sufficiency of the proof of wills in Surrogates' courts, and none other being prescribed for the Court of Chancery, the latter was bound, by them, as far as practicable, in the cases where jurisdiction was thus conferred upon it. By the act of 1837 (ch. 260, § 10), two at least of the witnesses to a will of real *or personal* estate, if so many were living in the State and of sound mind, were required to be produced and examined; and the death, absence, or insanity of any of them was required to be satisfactorily shown. By a subsequent provision, if *all* the witnesses were dead, out of the State, etc., proof might be taken of their handwriting, and of that of the testator. Now, by § 2618 of the Code, at least two of the witnesses, in all cases, must be produced and examined before the Surrogate, if so many are within the State and competent and able to testify; by the next section, the absence, death, etc., must be shown by competent proof, before dispensing with his or their testimony; and, by § 2620, provision is made for the proving of the handwriting of *any or all* who may be dead, absent from the State, etc.

The jurisdiction conferred by the R. S. upon the Court of Chancery to prove a lost or destroyed will was, when that court was abolished, devolved upon

the Supreme court, whose powers on the subject have been somewhat modified by §§ 1861, 1862 and 1863 of the Code. Section 2621 confers upon Surrogates' courts concurrent power, in regard to admitting such wills to probate. It will be seen, by reference to § 1863, when the action is brought in the Supreme court, that "where the parties to the action, who have appeared or have been duly summoned, include all the persons who would be necessary parties to a special proceeding, in a Surrogate's court, for the probate of the same will, and the grant of letters thereupon, *if the circumstances were such that it could have been proved in a Surrogate's court,*" the final judgment must direct, etc.

This precise question, as to proving a will by one witness when the other is not accounted for, it would seem, has never before arisen in this State, and the object of the examination of the history of this power so conferred upon the Supreme court, is to show that the *factum* of a lost or destroyed will must be established in the same manner as if the will itself were produced in court for probate; that is to say, two, at least, of the subscribing witnesses must be produced, or the non-production of them or either of them must be satisfactorily accounted for, and then the handwriting, or the fact of their having signed the will as witnesses, must be duly proven by competent testimony. The correctness of this position is sufficiently shown by the following cases: Grant v. Grant, (1 *Sandf. Ch.*, 235); Stephens v. Brooks (*Clarke*, 130); Everitt v. Everitt (41 *Barb.*, 385); Voorhees v. Voorhees (39 *N. Y.*, 463); see, also, Foster's Appeal (87

*Penn. St.*, 67; 1 *Am. Prob. R.*, 435, and notes). In the course of the researches made on the subject, no case has been found, where, in a proceeding to prove a lost or destroyed will, it was held that any proof, which fell short of that required by the statute for the proving of a will before the Surrogate, would be sufficient to establish it. At least two of the subscribing witnesses must be examined, if living and in the State and capable of testifying; and in case of death, absence, or insanity, the fact must be established by proper evidence, and then the fact of their having so subscribed may be proven. If only one witness be examined, and the handwriting of the other be not shown, then, as the Surrogate has now power to take the proof of a lost or destroyed will, it leads to the conclusion that he might, if the proponent's position be correct, admit it to probate on the testimony of a single witness and without calling the other, or accounting for his absence and proving that he signed as a witness, in defiance of the statutory regulations for proving one which is present. The case of *Colligan v. McKernan* (2 *Dem.*, 421), cited by proponent's counsel as an authority to show that a will may be proved by one witness, etc., is not in point. There the object of the proof was to defeat a will presented for probate by showing that it had been revoked by a subsequent will which was lost. The proceeding was not instituted to prove the lost will under the statute, and the learned Surrogate very properly held that one witness, at common law, was sufficient to sustain the objection to the will propounded. The Assistant V. C., in *Grant v. Grant*

(*supra*), says: "The will is said to be lost. But that does not affect the requisites to its due execution. Those must be proved as if it were present." So Justice BROWN, in the case of *Everitt v. Everitt*, says: "If there are witnesses to the execution of the instrument who have subscribed their names as such (and without subscribing witnesses, selected by the testator himself, a will has no force) they must also be produced and examined, if living and within the power of the court. If they be dead, or beyond the jurisdiction of the court, secondary evidence may be resorted to in this contingency, and proof taken of their handwriting."

I am thus led to the conclusion that the will in question has not been proven. John E. Parsons was the only witness examined as to the *factum* of the alleged will, which was drawn by him, the draft produced containing neither the name of the decedent nor those of the witnesses. While he cannot positively testify that he was a subscribing witness thereto, but thinks he was, yet, assuming that his impression is correct, he is unable to state who the other witness or witnesses were, and consequently, it was impossible to call them, or to show their absence or inability to testify, and thus lay a foundation for establishing the fact of their signatures by other proof. On this ground alone, probate should be refused.

But the proponent has wholly failed in his proof in other respects. He has not shown the will to have been in existence at the time of the death of the testatrix; nor that it was fraudulently destroyed during



her lifetime. It is true, he has offered much evidence with a view to establishing one or the other of those facts, but it falls far short of that conclusive character essential to either of those purposes. The declaration of the testatrix, to the effect that she had made a will of a certain character, uttered seven months before her decease, does not rebut the presumption of its destruction by her, *animo revocandi*, arising from the fact that none could be found, after diligent search made soon after her death (*Betts v. Jackson*, 6 *Wend.*, 173; *Knapp v. Knapp*, 10 *N. Y.*, 276; *Schultz v. Schultz*, 35 *id.*, 653; *Eighmy v. People*, 79 *id.*, 546). Nor does the fact that an opportunity existed for the fraudulent destruction of the will, by those to whose interests it was inimical, overcome the presumption of such destruction by the deceased. There must be evidence furnished, strong enough in its character, to warrant the finding of the commission of such fraud by some one. Here none is found to justify such a conclusion. The contents of the will, after its execution in the manner shown, seem never to have been seen by any one, and the document was traced into the possession of the deceased in 1877, which was the last time, so far as appears, that the paper was ever seen.

In my view of the case, the declarations of the deceased as to the existence of the will, or of its destruction by her, and which were respectively objected to, are of little consequence, and no careful examination of the authorities cited has been made, although the better opinion would seem to be that the former are, in this case, admissible, while the

latter are not, and the objections thereto are disposed of accordingly. The matter turns upon considerations other than these.

There seems to be still another difficulty in the way of the establishing of this as a lost or destroyed will. Section 1865 of the Code requires that the provisions of the will shall be clearly and distinctly proven by at least two credible witnesses, a correct copy or draft being equivalent to one witness. This is the same as § 67 of the R. S. above quoted, and is made specially applicable to a proceeding of this character, in a Surrogate's court, by the same section which confers jurisdiction on it to prove such will. In this case, Mr. Parsons produced the draft of the will made by him, which, he substantially testifies, was correctly engrossed by his clerk, and, so engrossed, was executed by the decedent. Hence that draft may be treated as a substitute for one of the two witnesses required by the statute. In no other way does he prove the provisions of the will. It is true, they were simple, devising and bequeathing all her estate, real and personal, to her brother George B. Collyer, the proponent, but that will not warrant the dispensing with the one witness which the statute requires beside the draft. If it did, then it would seem that, in all cases, the person verifying the draft or copy (and it would not be evidence without such verification,) by the very act of testifying to its correctness, would thereby become the needed witness. Such cannot fairly be considered the design of the provision. Another witness was required, to render the proof complete on this subject. Declarations of

the decedent as to the contents and substance of the will are not available for such a purpose. The evidence must come from some person who has read, or heard read, the document. None was produced, and the proof, therefore, falls short of what the statute requires.

Probate of the alleged will is accordingly refused, with costs to the contestants against the proponent

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On the settlement of the decree in the above matter, counsel for proponent claimed, first, that the proponent was entitled to costs, as a matter of right, under subd. 3 of § 2558 of the Code, and that the court had no discretion on the subject; and second, that only one bill of costs could be allowed to all of the contestants, although they appeared separately, and by different attorneys.

THE SURROGATE.—As to the first point, I think that proponent's counsel is clearly in error. That subdivision applies only to a *contestant* of a will propounded for probate, and not to a *proponent*. Where a will is offered for probate, and a person, who is named as executor in a prior or subsequent one, contests the one so offered, and seeks to have it established, and thus defeat that which he contests, if he fail, acting in good faith, he shall be entitled to costs. That is by no means this case. Here George B. Collyer is the proponent, and not the contestant of any will. The object of this subdivision is stated in the Commissioners' note to be "to check the vastly in-

creasing number of cases, wherein wills are contested upon slight grounds, the contestants relying, if the estate is large, upon procuring an allowance for costs which will indemnify them against the expense of the litigation." The case of *Whelpley v. Loder* (1 *Dem.*, 368) furnishes an instance of the applicability of the subdivision to such a state of facts as is above supposed. Therefore, the proponent is not entitled to costs, as a matter of right.

In reference to the second point, it cannot be doubted that the different contestants had a perfect right to employ separate counsel to protect their several interests; and although they filed no written objections, yet the respective attorneys contested the matter throughout, and with much earnestness and zeal. The proponent commenced the proceeding solely in his own interest, possessed of no knowledge or evidence of facts to sustain it, trusting, apparently, to chance for their development, in which he failed. He cannot escape the consequence of such risk, by leaving the contestants to pay their own expenses in resisting his reckless attack upon their rights. The power of granting to or withholding costs from several defendants is, as is shown by the authorities cited by proponent's counsel, discretionary with the court (*Hauselt v. Vilmar*, 76 *N. Y.*, 630). This seems to be a case where it is eminently proper to charge the costs of each contestant upon the proponent, personally; and it is so ordered.

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MATTER OF NEWMAN.

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WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,  
SURROGATE.—February, 1886.

MATTER OF NEWMAN.

*In the matter of the judicial settlement of the account  
of CHARLES HAINES, executor of the will of AMOS  
NEWMAN, deceased.*

An adult legatee, who is entitled to receive, as such, a specified sum, "in government bonds," may elect to take the same in money.

Testator, by his will, having bestowed the use of all his property upon his wife for life, gave legacies, to take effect on her death, of \$2,000 to C., and, of \$1,000 to each of three nephews, the sums being given, in each case, "in government bonds." Testator left government bonds, to the amount, at par, of \$4,000, only.—*Held,*

1. That, as testator neither bequeathed his government bonds, nor made the legacies payable out of the same, they were neither specific nor demonstrative, but general legacies payable in a specified manner, and were all subject, with other general legacies, to *pro rata* abatement, in case of a deficiency of funds, except as otherwise provided by the will.
2. That such legacies should be satisfied, by the executor, by investing the requisite sums in government bonds, so far as they would go, and delivering such bonds to the legatees.

CONSTRUCTION of will, at the instance of executor, upon judicial settlement of his account, with a view to the proper disposition of the funds of the estate.

CHARLES HAINES, executor, in person.

THE SURROGATE.—By his will, the testator gave to his wife, who is now dead, the use of all his estate for her life. Then, by the third clause, he provided as follows: "I give and bequeath unto my said daughter in law, Clarissa A. Newman, to take effect at the death of my said wife, the sum of two thousand dol-

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MATTER OF NEWMAN.

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lars in government bonds, and to her heirs and assigns forever." By the fourth, fifth and sixth clauses, he gave to each of three nephews, Horace, Hosea and Amos Lounsbury, on the death of his wife, "one thousand dollars in government bonds;" making in all \$5,000. By the seventh, eighth and ninth clauses, certain amounts are bequeathed to other persons, and they are, unquestionably, general legacies. By the tenth clause, after the death of his wife, he bequeaths the residue of his personal estate to the three nephews named, and to his niece, Sarah J. Reynolds, a general legatee named in the seventh clause, share and share alike; and then proceeds as follows: "but should there not be enough to pay off the several legacies, then enough must be taken out of my three nephews and niece to make enough to pay off the same."

The testator left government bonds to the amount, at par, of only \$4,000, and there are not sufficient assets to pay all the legacies. Those to the daughter in law and the three nephews of sums of money, "in government bonds," possibly, were so given by the testator under the erroneous supposition that the amount, at par, which he had, was \$5,000. However that may be, the legacies "in government bonds," are not specific (*Tift v. Porter*, 8 *N. Y.*, 516); nor are they demonstrative, because not directed to be paid out of any particular fund, as was done in the cases of *Giddings v. Seward* (16 *id.*, 365), and *Newton v. Stanley* (28 *id.*, 61); nor out of any specified portion of his assets. The case of *Pierrepont v. Edwards* (25 *id.*, 128), cited by the executor, carries the definition of what is a demonstrative legacy, by a

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MATTER OF NEWMAN.

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divided court, to its extreme verge ; still, it was there held to be such. But here the legacies are not specific, nor are they demonstrative. The testator does not bequeath *his* government bonds, nor does he make the legacies payable out of them. He simply gives general legacies of money, payable in a certain manner. The effect would have been the same if he had directed them to be paid in gold coin, in greenbacks, in bonds and mortgages, in cattle, sheep, or horses. All are nothing more than general legacies, and all equally subject to abatement, in case of deficiency, had not the testator otherwise provided.

It results then that, Mrs. Newman's legacy being payable in full, the executor should, with the two thousand dollars bequeathed to her, invest that sum, so far as it will go, in government bonds, and deliver the same to her. For the purposes of the will, the bonds left by the testator may be converted into money, which, with other assets, should be applied toward the payment of all the general legacies, except those to the nephews and the niece, and then what remains, if insufficient to pay them in full, must be divided *pro rata* among them ; the shares of the three nephews being used by the executor in the purchase of government bonds and delivered to them, as contemplated by the will.

It is, doubtless, competent for any or all of the legatees, to whom sums are given, payable in such bonds, being of full age, to take money instead, at their option.

Decreed accordingly.

MATTER OF REYNOLDS.

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WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,  
SURROGATE.—February, 1886.

MATTER OF REYNOLDS.

*In the matter of the application to prove a paper propounded as the will of PHILIP REYNOLDS, deceased.*

An alleged will, subscribed by decedent, by making a cross mark, and one of the two subscribing witnesses whereto is dead, cannot be admitted to probate upon the testimony of the living witness, and proof of the handwriting of the other,—there being no possibility of “proof of the handwriting of the testator,” which is made essential by Code Civ. Pro., § 2620, where “a subscribing witness whose testimony is required is dead.”

As to whether the difficulty would be obviated, were another witness able to testify that he saw the decedent make his mark—*quære*.

DENNIS KELLEY, an executor named in a paper propounded by him, purporting to be a will of the decedent, after proving the due execution thereof by one of the subscribing witnesses, and the handwriting of the only other subscribing witness, who was shown to be dead, asked to have the same admitted to probate. The testator's name was written by the deceased witness, and the will was subscribed by Reynolds, by making a cross mark.

M. L. COBB, *for proponent*.

THE SURROGATE.—On the proof offered, probate must be denied. Section 2618 of the Code declares that “before a written will is admitted to probate,



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QUIN V. HILL.

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two, at least, of the subscribing witnesses must be produced and examined, if so many are within the State, and competent and able to testify." Then, § 2620 provides that ". . . . if a subscribing witness whose testimony is required is dead . . . . the will may nevertheless be established upon *proof of the handwriting of the testator, and* of the subscribing witness, *and* also of such other circumstances as would be sufficient to prove the will upon the trial of an action." It will, therefore, be readily seen that in such a case, and in all cases of the kind, it is an indispensable requisite that the handwriting of the testator shall be proven. That is to be done by some one sufficiently familiar with the cast or form of writing of the person, to enable him to identify it as his. But a cross mark has no such cast or form as to distinguish it from a like mark made by any other individual. It cannot be the subject of expert testimony. The difficulty would, doubtless, be obviated were another witness able to testify that he was also present and saw the deceased make his mark.

Probate refused.

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WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,  
SUBROGATE.—March, 1886.

QUIN v. HILL.

*In the matter of the estate of JOHN S. HILL, deceased.*

A husband is bound, as matter of law, to bury the body of his deceased wife; yet he may be allowed the funeral expenses out of her estate, if any. But a third person who unnecessarily interferes and gives direc-

## QUIN V. HILL.

tions, as to the expenditures, becomes personally and ultimately liable for the amount thereof.

In order to warrant the allowance of a counterclaim against the liability of an executor or administrator, on account of the estate which he represents, the debts must be mutual, and due to and from the same persons in the same capacity.

Upon the judicial settlement of the account of the executrix and executor of decedent's will, a decree was rendered, directing the payment of about \$600 to the administrator of the estate of A., one of the beneficiaries under the will, who had died subsequently to the testator. The administrator having instituted proceedings to compel the payment to him of the sum so decreed, the executors sought to set off against this liability a demand representing the amount of an undertaker's bill incurred on account of the funeral expenses of such beneficiary.

It appeared that F., the executrix, who was the mother of A., in the presence of A.'s husband, had given to the undertaker the directions for the burial, instructing him to spare no expense in respect thereto, with which instructions the latter had complied; and that, upon her refusal to pay the bill, an action had been brought, and a personal judgment recovered against her for the amount, which she paid, taking an assignment thereof to herself and her co-executor, in their representative capacity.—*Held*,

1. That F., by her officious interference in the matter of her daughter's burial, and by ignoring the rights and duties of the husband in the premises, relieved both him and the daughter's estate from the obligation otherwise imposed upon them by law, and became personally liable for the expenses in question.
2. That it was not competent for F., by procuring the assignment mentioned, to transmute the demand from one against herself, into one in the executors' hands against the estate of her daughter, and that, therefore, the counterclaim should be disallowed.

THE testator left a daughter, Arabella, the wife of Henry W. Quin, Jr., who was a beneficiary under the will, and who died in January, 1885. The executors, Frances C. Hill and Edward Petit, rendered an account of their proceedings, which resulted in a decree, entered June 5th, 1885, whereby it was, among other things, adjudged that there was due to Arabella Quin the sum of \$613.64, and directed that the executors pay the same to her legal representative. Said Henry W. Quin, Jr., was appointed administrator of her estate

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QUIN V. HILL.

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on the 29th day of the same month. Frances C. Hill, the mother of Arabella, in the presence of the husband of the latter, gave the directions for her burial to the undertaker, telling him to spare no expense, as it was the last thing she could do for her daughter. The Quins lived with Mrs. Hill, and the death took place at her house, where the funeral arrangements were made.

Solomon M. Ireland, the undertaker, presented his bill, amounting to \$435.48, to Mrs. Hill, who declined to pay it. He then brought an action against her for its recovery. On July 15th, following, she paid it, and took an assignment of it to herself and Petit, as the executrix and executor of the will of their decedent. Thereafter the administrator took measures to compel the payment to him of the amount decreed to be due to his intestate. On the return of the citation, the executors sought to set off against it the amount of the undertaker's bill.

EDWARD F. BROWN, *for administrator.*

RODMAN & ADAMS, *for executors.*

THE SURROGATE.—As matter of law, a husband is bound to bury the body of his deceased wife, but he may now be allowed the funeral expenses out of her estate, if she have any; and the executor or administrator is ultimately liable therefor, in most instances. But where, in the absence of the personal representative or the person bound to bury a dead body, or from the necessity of the case, another incurs the expense of a proper burial, he may recover it from the person

or estate that was bound to do it (Appendix to 4 *Redf. R.*, 527). An examination of the authorities collated by Mr. REDFIELD (*Redf. Surr. Prac.*, 3rd ed., 465), and of those cited in *Rappelyea v. Russell* (1 *Daly*, 214), and in *Patterson v. Patterson* (59 *N. Y.*, 574), discloses the fact that, in this case, features are presented which do not exist in any of the cases relating to the subject. Here, the mother of the deceased, and in the presence of Mr. Quin, the husband, assumed the entire control of the arrangements for the burial ; sending for the undertaker, and directing him to spare no expense, as it was the last thing she could do for her daughter. This clearly showed an intention on her part to personally defray the charges. That the undertaker acted in pursuance of her request, is sufficiently apparent from the amount of his bill. It is equally clear that she was personally liable to him for it. As her daughter and the husband were living with her, and the death occurred under her roof, it was not unnatural that she should have had something to say in regard to the funeral arrangements, but she went much farther than to merely consult and advise ; she, officiously and in the presence of the husband, assumed the whole direction, ignoring his rights and duties in the premises, and thus relieved both him and the estate of his wife from the obligation otherwise imposed upon them by law.

There is another aspect of the case. It is not pretended that the executors of Mr. Hill, as such, incurred any obligation in regard to the funeral expenses. It was beyond the scope of their executorial powers. Mrs. Hill, finding that she could not successfully resist

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QUIN V. HILL.

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the undertaker's claim, sought by his assignment of it, to transmute it from one against herself, into one in the executors' hands against the estate of her daughter. In other words, they purchased a claim which existed against her personally, and now seek to use it as a counterclaim against the amount of their liability as fixed by the decree. It seems to me that they might, with equal propriety, have purchased any debt which Mrs. Quin had incurred in her lifetime, and asked to have it allowed in this matter. Of course, that could not be done, because it would be a matter for the administrator to deal with in the due course of administration, to say nothing of their want of power as executors to purchase.

If the executors lacked the power to use the funds in their hands, to invest in this bill of Mr. Ireland, then it cannot be used here in the manner sought; and my researches have not enabled me to find any authority which would sanction such a procedure on their part. Mrs. Hill was aware of her personal liability to the undertaker, and had been sued by him before the decree fixing the amount due to the estate of Mrs. Quin had been entered. This funeral bill did not enter into consideration on that accounting; nor could it, as it then would have been an individual claim of Mrs. Hill. The decree fixed the sum which was due from the estate of John S. Hill, deceased, to Mrs. Quin or her legal representative, and the amount of this bill, which accrued since the death of the testator, and which the executors own personally, cannot be the subject of set-off or counterclaim against their liability on account of the estate they represent.

In order to warrant the allowance of such counterclaim, the debts must be mutual, and due to and from the same persons in the same capacity (*Dudley v. Griswold*, 2 *Bradf.*, 24, and cases cited).

As Surrogate BRADFORD well said, in the principal case, "the business of an executor or administrator is to settle the estate, pay the debts and distribute the surplus, and not to speculate in demands against the creditors" (and he might have added "legatees or distributees"). "It is not a legitimate purpose for which to employ the trust funds, to buy up debts against claimants; and if he does so, he must take the risk of such dealings upon his own individual responsibility. On the other hand, if such transactions be lawful, the money advanced to purchase such claims may be legally charged to the estate; and the consequences of such a doctrine may, in many cases, be most disastrous."

There are other reasons, unnecessary to be considered here, why the counterclaim should not be allowed. The grounds stated are deemed sufficient to warrant its rejection, and therefore, no good cause to the contrary being shown, the direction of the decree in this respect should be obeyed by the executors.

Ordered accordingly, with costs of the motion.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,  
SURROGATE.—March, 1886.

SMITH v. CENTRAL TRUST CO.

*In the matter of the judicial settlement of the account  
of the CENTRAL TRUST COMPANY, as trustee under  
the will of ELIZABETH R. UNDERHILL, deceased.*

The clause added, in 1879, to Code Civ. Pro., § 66,—enacting that, “from the commencement of an action, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client’s cause of action or counterclaim, which attaches to a verdict, report, decision or judgment, in his client’s favor, and the proceeds thereof, in whosoever hands they may come”—has no application to Surrogates’ courts, since in those tribunals actions, and counterclaims therein, are unknown.

Eisner v. Avery, 2 Dem., 466, on this point—disapproved.

*It seems*, that the lien, established by the clause quoted, is for the services of the attorney in the action, the value thereof being fixed by agreement express or implied; and is confined to actions for the recovery of money, or wherein a pecuniary demand is asserted by way of counterclaim.

A claim, by an attorney against his client, for services rendered to the latter in a special proceeding in a Surrogate’s court,—based upon an alleged agreement to pay the sum demanded, which the client denies,—raises an issue for a jury, and which that court is incompetent to try.

Upon an accounting by the successor of the executor of decedent’s will, the attorneys who had appeared for two beneficiaries, G. and V., on an accounting by the executor, claimed a lien for their services on the amount of their clients’ legacies, as determined by the decree entered in the latter proceeding, to the extent of \$1,000, beyond the costs awarded by that decree, and presented an affidavit setting forth that, about two years after the decree was entered, they had presented a bill for that sum to G., who had agreed to pay the same. This agreement was denied by G., in an affidavit averring that the attorneys had undertaken to perform the services in question for the amount of costs to be allowed by the decree.—

*Held*, as matter of law, that no lien existed for the sum demanded by the attorneys, and that payment thereof could not be awarded, the court having no power to try the issues of fact presented by the affidavits.

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SMITH V. CENTRAL TRUST CO.

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ON the return day of the citation in this matter, Smith & Randall, attorneys at law, represented that they had acted as such for Barnard R. Guion and Mary T. Van Voorhis, legatees, on an accounting of the executor (since resigned) of the will of decedent, in which a decree was entered in 1882 (see 1 *Dem.*, 306); that, as such attorneys, they had a lien upon the amounts of the respective legacies of said Guion and Mrs. Van Voorhis, as determined by the decree, over and above the amount of the costs allowed to their clients as fixed thereby, to the extent of \$1,000, of which they had given the Central Trust Company, now trustee, notice. Mr. Randall submitted an affidavit made by him, in which he deposed that, in or about July, 1884, and after the entry of the decree, he gave a bill for such services, amounting to \$1,000, to Guion, who agreed to pay the same, but who had failed to pay it or any part thereof. Mr. Guion filed an affidavit in which he denied ever having agreed to pay any such bill, and averred that Smith & Randall agreed, when they undertook the case, that the allowance to be made by the Surrogate should cover their entire charge. It did not appear that any agreement was made with Mrs. Van Voorhis.

SMITH & RANDALL, *in person.*

ALEX. THAIN, *for Guion and Van Voorhis.*

THE SURROGATE.—It does not seem that, at common law, an attorney had a lien upon the judgment recovered by him for his client, for his costs and compensation. Such lien was established by the courts



as an equitable principle, for the protection of their officers. In the time of Lord MANSFIELD, the rule was not then of ancient origin. It has been followed by our courts, consistently, down to the adoption of our Code of practice, when it was enacted that the compensation of an attorney should be governed by the agreement, express or implied, with the client. This provision induced a decision by the learned Judge DALY, in *Ward v. Syme* (9 *How. Pr.*, 16), to the effect that the attorney's lien was not limited to the amount of costs inserted in the judgment, but extended also to the amount of compensation agreed upon between the attorney and client, and if there were no agreement, then to what he might be entitled to, on a *quantum meruit*, in addition. This doctrine, however, was disapproved by the Supreme court in *Haight v. Holcomb* (16 *How. Pr.*, 173), where it was held that the lien was restricted to what appeared as costs on the judgment roll. But this view was likewise disapproved in *Marshall v. Meech* (54 *N. Y.*, 140), the Court of Appeals there holding that such lien extended also to any sum which the client had agreed his attorney should have as a compensation for his services; that, to the extent of the taxed costs entered in the judgment, the judgment itself was legal notice of the lien, but as to the further compensation, fixed by agreement, express or implied, notice had to be given in order to protect the lien. This was approved in *Wright v. Wright* (70 *N. Y.*, 98), and in *Coughlin v. R. R. Co.* (71 *N. Y.*, 443 [1877]).

Following these cases, in 1879, section 66 of the Code of Civil Procedure was amended by adding

thereto these clauses: "From the commencement of an action or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision or judgment in his client's favor and the proceeds thereof in whosoever hands they may come; and cannot be affected by any settlement between the parties before or after judgment." This does not state, in words, what the attorney's lien is for, but as the section, before the addition of the foregoing amendment, provided that "the compensation of an attorney or counsellor for his services, is governed by agreement, express or implied, which is not restrained by law," it must be presumed that the lien is for such services, the value thereof being fixed by such agreement. The amendment recognized, by positive enactment, the lien which the courts had already declared to exist, and limited it to cases where an *action* was commenced, or a counterclaim was interposed in such action, and provided, in effect, that the lien for the sum agreed upon should not be affected by want of notice thereof.

It is not necessary to discuss the question as to whether this amendment was intended to include a lien for the costs embraced in the judgment roll, as well as the compensation, beyond those costs, covered by the sanctioned agreement between attorney and client, because it is not claimed that the costs, as adjusted, are here involved. That it does, by positive enactment, establish such a lien for the agreed compensation, there can be no question, and it would

seem equally beyond doubt that no such lien can exist, except where an action has been commenced for the recovery of money, or a sum of money has, in an answer, been sought to be established or recovered by way of counterclaim. Hence, as the attorneys base their claim to recover upon § 66 of the Code, as it now stands, it would seem that they must fail, as actions and counterclaims therein are unknown in Surrogates' courts, where all proceedings are special proceedings.

The case of *Eisner v. Avery* (2 *Dem.*, 466) has been cited as an authority to show that the section in question applies to such courts. It is with much self-distrustful hesitation that I feel constrained to dissent from any view of administration law taken by Surrogate ROLLINS, but after much reflection I find I must disagree with him on this point. There the contention related solely to the allowance as fixed by the decree. The decision of the point was not material to the determination of that case. Had it been so, the learned Surrogate would have examined it with that diligent research, and bestowed upon it that careful consideration for which his opinions are distinguished. His *dictum* seems to be founded upon the opinion of the Supreme court in *Flint v. Van Dusen* (26 *Hun*, 606), where the court held that the attorney's services, having been rendered before Surrogates' courts became courts of record, no lien existed. It did not refer to, nor consider the question of the applicability of § 66 to these courts, although it might be inferred, from the language employed, that it was regarded as so applicable. I

fail to discover how the fact of these courts having become courts of record affects the question.

The point has here been considered with some care, not because the determination of this matter turns wholly upon it, but because of its importance as an abstract question, likely to arise in future cases.

There can be no lien for an attorney's compensation, beyond the taxed costs, based upon an agreement, express or implied, made after judgment. The law, fairly construed, gives none unless the agreement between attorney and client be made before, or pending the action. Here, the attorneys claim such lien, founded upon an alleged agreement made about two years after the entry of the decree which terminated the litigation. It is established only by showing that a bill for \$1,000 was then handed to Mr. Guion, who agreed to pay it. Under such circumstances, surely no lien could be created, were it a case for it. But Guion denies that there ever was such agreement made by him. This raises an issue which this court could not try. It is clearly a case for a court and jury, and however such an action might terminate, the question of a lien would not be an element to be considered, because, as I have endeavored to show, no such lien exists. But again, Guion's affidavit shows that the attorneys agreed to accept, in full for their services, such allowance as should be made to them by the court. An allowance of a large amount was made to them, after a protracted litigation, which it is understood the attorneys received.

The papers before me do not disclose any ground

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MATTER OF DEARING.

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of the claim, or the extent thereof, against Mrs. Van Voorhis, if indeed any claim, distinct from that against Mr. Guion, be made.

My conclusions are that § 66 has no application to this court; and that, if it had, the court has no power to try the issues of fact set forth in the affidavits.

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WESTCHESTER COUNTY—HON. OWEN T. COFFIN,  
SURROGATE.—April, 1886.

MATTER OF DEARING.

*In the matter of the estate of THOMAS DEARING,  
deceased.*

An executor, whose letters have been revoked in consequence of his having been adjudicated a lunatic, though afterwards judicially restored to sanity and the possession of his property, can never be rehabilitated in office.

Of the two persons, A. and B., nominated executors of a will, the former alone qualified and entered upon the discharge of his official duties. Having been judicially declared to be incompetent to manage his affairs, A. was removed from office, and letters were issued to B., who died. Thereafter A., who had been adjudged to be again sane, asked that letters testamentary be reissued to him.—

*Held*, that there was no rule of the common law, nor provision of statute, authorizing the court to grant the prayer of petitioner, and that an administrator, with the will annexed, must be appointed.

GILBERT H. DEARING and Francis Childs were named as executors in the will of decedent, which was admitted to probate in January, 1878. Gilbert H. Dearing alone qualified, and took upon himself the burthen of its execution, and entered upon the

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MATTER OF DEARING.

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discharge of his duties. In 1882, he was duly adjudged to be a lunatic, a committee appointed, and he was sent to the asylum for the insane in Binghamton, N. Y. On application being made to the court, setting forth the facts above stated, and after citing the proper parties, a decree was made on April 3rd, 1883, revoking the letters testamentary issued to said executor. Whereupon Francis Childs, the other executor named in the will, a resident of Boston, Mass., applied for letters to be issued to him, which application, on his taking the oath of office, was granted, and the letters issued accordingly.

In March, 1885, the Supreme court, by an order then made, reciting the fact that Dearing had become competent to manage himself and his affairs, discharged the committee and directed him to restore to Dearing his property. The latter now asks that letters testamentary be reissued to him as such executor.

ABRAM S. UNDERHILL, *for applicant.*

THE SURROGATE.—There seems to have been no provision of law made, under which new letters can be issued to an executor or administrator, where they have been revoked; and no common law rule appears to exist, authorizing it to be done. The decree of revocation must be regarded as conclusive and final, unless obtained fraudulently, or on some other ground which would warrant the court in setting it aside or vacating it.

Suppose the executor whose letters have been revoked had been the only one named in the will, and an administrator with the will annexed had been duly

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MATTER OF DEARING.

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appointed, and afterwards the ground of revocation had ceased to exist, could the court displace the administrator and replace the executor? So, if an executor, after entering upon his duties, should remove from the State, and, on being required, should fail to give a bond, in consequence of which his letters should be revoked, would he, afterwards, on removing into the State again, be entitled to be restored to the office he had vacated? And again, suppose he were, while executor, convicted of an infamous crime and imprisoned in a State prison, in consequence of which his letters were revoked; and suppose that, pending his term of imprisonment, he should be pardoned and restored to citizenship, could the court again create him executor? These questions require an answer in the negative. Where letters have once been revoked, the appointment of the executor has ceased to exist, just as completely as if he had never been named by the testator. He cannot be rehabilitated.

In this case there is an executor duly qualified and acting. It may be inconvenient or impossible for him to discharge his duties. In that case, he could apply to have his resignation accepted, and, if successful, then an administrator with the will annexed might succeed him.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,  
SURROGATE.—April, 1886.

MEAD v. JENKINS. .

*In the matter of the disposition of the real property  
of JOHN P. JENKINS, deceased, for the payment  
of his debts.*

Where the decree of a Surrogate's court has been reviewed by the Supreme court, and the matter remitted to the former with directions to proceed therein, it is for the Surrogate's court to decide as to the sufficiency, to stay its further action in the premises, of an undertaking given by a party, on appeal from the judgment of the Supreme court to the Court of Appeals.

An appeal, to the Court of Appeals, from a judgment of the Supreme court modifying a Surrogate's decree which determined the amount of a creditor's claim in a special proceeding for the disposition of decedent's real property, is not an "appeal taken from a judgment for a sum of money, or from a judgment or order directing the payment of a sum of money," within the meaning of Code Civ. Pro., § 1327, relating to security upon appeal. That section contemplates an appeal from a judgment or order fixing upon the appellant a personal liability to pay a specified sum of money.

Nor is such an appeal within the purview of Code Civ. Pro., § 1331, prescribing the security requisite to stay the execution of a judgment or an order "directing the sale of real property."

Accordingly, where a party appealing from a judgment of the Supreme court, of the character mentioned, files a general undertaking, as prescribed by Code Civ. Pro., § 1326, "to the effect that he will pay all costs and damages which may be awarded against him on the appeal, not exceeding five hundred dollars," all further proceedings in the Surrogate's court are stayed during the pendency of such appeal.

THE facts appear sufficiently in the opinion.

S. SERGEANT, *for the petitioner:*

Cited Code Civ. Pro., § 1327 and § 1312, subd. 1.

M. L. COBB, and S. S. MARSHALL, *for administrators, widow and heirs.*



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MEAD V. JENKINS.

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THE SURROGATE.—An appeal was taken by George W. Mead, a creditor of John P. Jenkins, deceased, from a decree of this court directing a sale of certain real estate, of which the intestate died seized, for the payment of his claim, which, after litigation, was fixed at \$145 and interest (3 *Dem.*, 551). Mead claimed a much larger sum to be due to him, and the general term of the Supreme court reversed the decree of this court on that point, found the amount of his claim to be \$1,139.06, and interest, with costs, and remitted the matter to this court with directions to proceed accordingly. Stephen M. Sherwood and Mary E. Jenkins, the administrators, and Mary E. Jenkins as the widow, and two of the heirs at law, have appealed from the decision of the general term to the Court of Appeals, by two attorneys, and have filed two undertakings, each conditioned to pay all costs and damages that may be awarded against them, not exceeding the sum of five hundred dollars. One of the undertakings is on the appeal of the administrators, the widow, and Evelyn Watson, an heir at law, and the other on the appeal of Robert C. Jenkins, also an heir at law.

This court is now asked to proceed in the matter as directed by the appellate court, on the ground that the undertakings given are insufficient to stay the proceedings, because they are not conditioned to pay the amount of the debt as fixed by the latter court, as required by § 1327 of the Code. It would seem, therefore, that this court must determine as to the sufficiency or insufficiency of these undertakings to stay its further action in the premises.

The sole object of requiring appellants to give undertakings appears to be to secure respondents against possible and probable loss resulting from the damage and injury which might be caused by appealing. For instance, if the judgment were for a sum of money, or a judgment or order directing the payment of a sum of money, if the appellant, pending the appeal, were to become bankrupt, or to so dispose of his property as to render the ultimate affirmance of the judgment or order fruitless, it would be encouraging the unscrupulous to cast cheap obstacles in the way of his creditor to the recovery of what was justly due to him. Hence § 1327 guards against such untoward results. So, in actions of ejectment, and of foreclosures of mortgages, care is taken by § 1331, that those who may recover, shall not be damaged and injured by appeals. The same legislative wisdom has thrown safeguards, against such results, about other cases where appeals are permitted. There seems to be no reason for such a rule in a case like this.

The appeal from the judgment of the general term cannot, in this instance, be regarded as an appeal "taken from a judgment for a sum of money, or from a judgment or order directing the payment of a sum of money," within the meaning of § 1327. That seems to contemplate the case of an appeal from a judgment or order which adjudges the appellant to be personally liable to pay a fixed sum of money. Here, neither the administrators, the widow, nor the heirs at law are adjudged to pay anything. This is a proceeding *in rem*. The real estate of the deceased

alone, is liable to pay such sums as may be established as liens upon it. If it sell for less than the claims as allowed, there is no liability resting upon any of the appellants to pay the deficiency; and none of them are in the occupation of the premises sought to be sold. Hence, it would appear that neither the above section, nor § 1331, can be regarded as applicable.

Counsel for the respondent in the appeal also refers to subd. 1 of § 1312, as governing in this matter. That subdivision is to the effect that the court to which the appeal is taken may make an order dispensing with or limiting the security required to stay the execution of a judgment, where the appellant is an executor, administrator, trustee, or other person acting in another's right. In the first place, the administrators are not the sole appellants, and in the second place, they cannot be said to be acting in others' rights. The widow and heirs at law are here acting in their own interests, and with which the administrators, as such, have nothing to do. They are made necessary parties by the statute, and have no concern in the real estate, other than to obey the orders which may be made touching the sale. In doing that, they will be acting as much in the rights of the creditor, the respondent, as in the rights of the widow and heirs.

For these reasons, the appellants having given the notices of appeal, and undertakings as required by § 1326 of the Code, I think they have so perfected their appeals as to stay all further proceedings here.

HILL V. HORTON.

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WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,  
SURROGATE.—May, 1886.

HILL v. HORTON.

*In the matter of the application for the probate of a  
paper propounded as the will of MARY HILL,  
deceased.*

While the conduct of the committee of the person of a lunatic, in fixing the residence of the latter, is subject to judicial control, the act of the committee will, until such control is invoked or exercised, be deemed to be the act of the court, performed through its duly constituted agent.

Upon an application to the Surrogate's court of Westchester county for the probate of a will, it appeared that decedent, whose domicil of origin was in the county of Putnam, had removed to the former county and resided therein until 1872, when she returned to Putnam where she resided ten years; that, in 1882, she was adjudged a lunatic by the Putnam county court, and H., a resident of Westchester was appointed committee of her person; and that H. at once took the decedent to live with her at the home of the former, where she died in 1886.—

*Held*, that the legal residence of decedent, at the time of her death, was in Westchester county, and that the Surrogate's court thereof had jurisdiction to take proof of her will.

THE petition of Mary D. Horton and Abraham Hill, named as executors in a paper propounded as the will of decedent, bearing date November 7th, 1882, presented with a view to the proving of it, alleged, among other things, that, at the time of her death, she was a resident of Westchester county. On the return day of the citation, it was objected that the Surrogate of Westchester county had no jurisdiction to take proof of the will, for the reason that the

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HILL V. HORTON.

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deceased was, at the time of her death, domiciled in the county of Putnam; that she was, in 1882 and for some time prior thereto, a resident of the town of Carmel in the latter county; that in July of the same year, in proceedings for that purpose, instituted in the county court of that county, she was declared to be of unsound mind and incompetent to manage her person and estate; whereupon James S. Anderson of the same county was duly appointed committee of her estate and Mary D. Horton, a resident of Yorktown, Westchester county, of her person.

It appeared that the latter at once took the decedent to live with her at Jefferson Valley, in said Yorktown, where she remained until her death, which occurred in April, 1886. Her domicil of origin was in Putnam county, but she afterwards removed into Westchester county, which is an adjoining county, where for a number of years she owned and resided on a farm. About the year 1872, she returned to the former county where she owned a small property, and where she resided at the time of the appointment of the committees.

A. RYDER, and E. WELLS, for Solomon Hill, and others, heirs at law and next of kin:

Cited *People v. Com'rs of Taxes* (100 *N. Y.*, 215); *Matter of Ann Lynch* (5 *Paige*, 120).

C. FROST, for proponents:

Cited *Wood v. Wood* (5 *Paige*, 596); *Holyoke v. Haskins* (5 *Pick.*, 26); *Payne v. Town of Dunham* (29 *Ill.*, 128); *Anderson v. Anderson* (42 *Vt.*, 350).

THE SURROGATE.—The precise question as to the

power of a committee, to change the residence or domicil of a lunatic committed to his charge, seems never to have been determined by any court of this state; but it was held by Chancellor WALWORTH, in *Wood v. Wood* (5 *Paige*, 596), that, in the case of guardian and ward, the former had a right to change the residence of the latter, even from one state to another, provided such change is made in good faith and with a view to his benefit, subject, however, to the power of the court to restrain an improper removal of an infant by his guardian, or even by his parent.

In the matter of *Ann Lynch* (*id.*, 120), cited by the contestants' counsel, and where the question affected a change of residence from one locality to another, apparently in the same city (New York), the Chancellor held that "the control which this court may, by its committee, exercise over the person of one who is found incapable of conducting his own affairs, in consequence of habitual drunkenness, is the same which it may exercise over an infant, or an idiot, or a lunatic. The guardian or committee is alone to decide, subject, however, to the superintending control of the court, as to the proper place in which the infant, *non compos*, or habitual drunkard shall reside, as he is liable for the consequences of a neglect to take proper care of the person committed to his care and custody. And it is the duty of the court to lend its aid to protect him in the proper exercise of that right."

While this *dictum* does not fully cover the exact question here presented, as it was uttered in view of

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HILL V. HORTON.

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the facts of that case, yet it recognizes the power which the committee had over the person of the habitual drunkard. Undoubtedly, the court may control the conduct of the committee in fixing the residence of the lunatic, or in any other respect, but until its power is invoked or exercised, the act of the committee will be deemed to be the act of the court, through its duly constituted agent. As has been seen, the court regarded the power of a committee of a lunatic, and of a guardian of a minor, to change and control the residence of the person *non compos*, or of the ward, as depending upon the same principle.

In *Holyoke v. Haskins* (5 *Pick.*, 20), it was held, in Massachusetts, that the domicil of an idiot may be changed by the direction or with the assent of his guardian. A like doctrine was held in the case of *Cutts v. Haskins* (9 *Mass.*, 543); and in *Payne v. Town of Dunham* (29 *Ill.*, 128). The case of *Anderson v. Anderson* (42 *Vt.*, 350) is very similar to this in its facts as well as in the question of jurisdiction, the law of that state providing for the settlement of the estate of a deceased person "in the probate district in which he shall have resided at the time of his death." Anderson, while residing in one probate district, became insane, and a guardian, called here a committee, was duly appointed, who afterwards removed the lunatic into another probate district of that state, where he died; and the question arose as to which district was his residence at the time of his death. The court held it to be that where he died, declaring that "the right of the guardian to change the domicil of his insane ward is founded on obvious

reasons of humanity and justice, and supported by authority, citing the foregoing Massachusetts cases, and others.

In this State, § 2476 of the Code of Civil Procedure provides that the Surrogate's court of each county has jurisdiction, exclusive of every other Surrogate's court, to take the proof of a will, where the decedent was, at the time of his death, a resident of that county. If, therefore, the committee had power to change the place of residence of the lunatic from Putnam to Westchester county, there can remain no doubt as to the jurisdiction of this court. That she had such power does not depend alone upon the cases already considered. The Supreme court of the U. S., in *Lamar v. Micou* (112 *U. S.*, 471, 472), after citing approvingly *Wood v. Wood*, *Cutts v. Haskins*, *Holyoke v. Haskins*, *Anderson v. Anderson* (*supra*) and others, said that "any guardian, appointed in the state of the domicil of the ward, has been generally held to have the power of changing the ward's domicil from one county to another within the same state and under the same law."

There can be no doubt, therefore, that the legal residence of the decedent, at the time of her death, was in this county, and the objection to the jurisdiction of this court is overruled accordingly.



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JOHNSON V. JOHNSON.

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WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,  
SURROGATE.—June, 1886.

JOHNSON v. JOHNSON.

*In the matter of the application for the revocation of  
ancillary letters of guardianship issued to JAHU  
W. JOHNSON, as general guardian of MILBANK  
JOHNSON and others, infants.*

The laws of this State, and the rules established by our courts, affecting the control and management of trust funds, govern, so far as they are applicable, with respect to property within the control of those tribunals, though the *cestuis que trustent* are residents of another state, and the custodian of the funds is acting under letters, issued here, ancillary to an appointment in the foreign jurisdiction.

Code Civ. Pro., § 2839, permitting a Surrogate to issue ancillary letters of general guardianship of the property of an infant residing in another state, in case he is satisfied "that it will be for the ward's interest" so to do, impliedly authorizes that officer to revoke such letters, where it appears that the like result will be accomplished by a revocation, and thus render secure the property of the ward yet remaining within his jurisdiction, irrespectively of the action of the court by which the guardian's powers were originally conferred.

JAHU W. JOHNSON was appointed by the proper court in Houston in the state of Texas, where he and his minor children resided, general guardian of Emma O. Johnson, Milbank Johnson, and Carrie B. Johnson, said minor children, in December, 1880. The children being entitled to certain property under the will of Gail Borden, admitted to probate in Westchester county, their general guardian, in the same month, applied for and obtained ancillary letters of guardianship from the Surrogate of that county. Application was now made by Gail B. Johnson, an adult brother

of the infants, to revoke the latter, on the ground that the guardian had improvidently managed the funds belonging to his wards, amounting to about \$90,000, which he had removed to the state of Texas, by making unsafe and improper investments thereof, and by employing a large part of the same in a private business which he was there conducting, and that he was, therefore, no longer a fit person to receive further funds belonging to them.

M. G. HART, *for petitioner.*

L. C. PLATT, *for general guardian.*

THE SURROGATE.—It is objected by the counsel for the guardian that this court has no power to revoke the ancillary letters, unless the principal letters shall first have been revoked. It is true, there is no express provision of the statute authorizing such revocation ; but it will be observed that the Code (§ 2839) authorizes the Surrogate to issue such letters where he is satisfied that it will be for the wards' interest to do so. It would seem, therefore, that where, after having granted such letters, a state of facts is shown which satisfies him that the wards' interests will be jeopardized by permitting any more of his property to be removed from the State under the authority conferred by such letters, it is his duty, without regard to the action of the court from which the principal letters were issued, to revoke them, and thus render secure the property of the ward which yet remains within his jurisdiction.

• It appears that, by the will of Gail Borden, their uncle, these minors are each entitled to an annual in-

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JOHNSON V. JOHNSON.

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come of several thousand dollars during their minority. If satisfied that it is in danger of being lost by the removal of it from the State, I think this court has the same power to revoke the ancillary letters that it had, in the first instance, to refuse them on the same ground.

It is alleged that the laws of Texas authorize investments of funds belonging to infants, on personal securities and in other modes which are forbidden as hazardous by our courts. It appears, from the testimony, that some of the investments, so made by the guardian there, have proved unproductive, while others may justly be regarded as endangering the integrity of the fund. The laws of this State, and the rules established by our courts affecting the control and management of such funds, must govern, so far as they may be applied to property yet within control. Of course, such as has already been removed to Texas, by virtue of the power given by the ancillary letters, is beyond reach, and must be managed under the laws of that state.

Decree revoking letters granted.

WESTCHESTER COUNTY.—HON. OWEN T. COFFIN, SURROGATE.—June, 1886.

CARMAN v. BROWN.

*In the matter of the application for the disposition of the real property of HARRY BROWN, deceased, for the payment of his debts.*

Decedent died October 1st, 1868, indebted to C., on simple contract, in the sum of \$300, which had become due and payable April 1st, 1868, and leaving a will nominating executors, to whom letters were issued on October 19th of the same year. In June, 1871, a judgment for the amount of the claim was recovered against the executors, who, in July, 1880, voluntarily rendered their first account, showing an insufficiency of assets to pay alleged debts. On May, 17th, 1886, C. instituted a special proceeding for the disposition of the real property of decedent, for the payment of his debts. Upon objection by the devisees,—  
*Held*, that C.'s claim was barred by the statute of limitations, his remedy against the real property gone, and that the application should be denied.

Mead v. Jenkins, 95 N. Y., 31—criticised.

*It seems*, that the limitation, contained in Code Civ. Pro., § 2750, of the time within which a creditor may present a petition for the disposition of a decedent's real property for the payment of his debt, to three years after letters are granted,—and the suspension, by id., § 1844, of the right of action therefor against the heirs and devisees during the same three years,—have no such connection as to justify a construction whereby the period of such suspension should be deemed to enlarge that of the limitation mentioned.

Where a testator devises his real property to one for life, with a direction that, after the death of the latter, the same be sold, and the proceeds divided, such property does not constitute legal assets of the estate during the lifetime of the *cestui que vie*.

THE SURROGATE.—Harry Brown died on October 1st, 1868, leaving a will which was admitted to probate on the 19th day of the same month and year. By it, his widow Judith was appointed executrix, and

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CARMAN V. BROWN.

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his sons George and Alfred were appointed executors thereof, all of whom qualified and have acted as such. The testator, among other things, devised his real property, consisting of a dwelling house and several acres of land, to his wife for life, and directed the same, at her death, to be sold, and the proceeds divided among his children, share and share alike. At the time of the testator's death, he was owing a number of debts, among which was one, on simple contract, to Emanuel Carman, of \$300, which became due and payable April 1st, 1868 (before his death). In June, 1871, Carman obtained a judgment against the executors for the amount of his claim; interest and costs.

In July, 1880, the executors voluntarily rendered an account of their proceedings for the first time, from which it appeared that there were not sufficient assets to pay the alleged debts. Whereupon Carman, on May 17th, 1886, presented an application for an order directing the executors to show cause why they should not be compelled to mortgage, lease or sell said real property, which still remained in possession of the widow, for the payment of such debts.

J. LAWTON, *for petitioner:*

Cited Mead v. Jenkins (95 N. Y., 31).

J. FLYNN, *for executors and devisees:*

Objected that the claim was barred by the Statute of Limitations, and cited same case (4 Redf., 369). He also objected that the land was legal assets.

THE SURROGATE.—It may be regarded as quite  
VOL. IV—7

anomalous, that a decision of this court should be relied upon as an authority, as against a decision reversing it, by the Court of Appeals. Of course, when that case was reversed by the latter court, on the ground that the claim was not barred by the Statute of Limitations, and was remitted to me with instructions to proceed accordingly, it became my duty to obey. But here, in another case, where the same question, substantially, is again presented, it would be shrinking from the performance of a grave official act, not to follow my own settled conviction upon the question involved, however much it may be in conflict with the opinion of that distinguished and learned appellate court. It cannot be the duty of an inferior tribunal, however humble, to bow with supple subserviency to the hasty and probably ill considered *dictum* of any court, however exalted, against its own matured judgment. I have the utmost respect for the learning, high character and integrity of our court of last resort, but do not regard it as utterly infallible, and believe it would have little respect even for the lowest court which should blindly follow its lead into an untenable position. To err is human, and with the mass of business weighing it down, it is but natural that here and there an error of judgment should be manifested. However lofty or lowly the courts may be, each, in its broader or narrower sphere, must expound and apply the law, on the subjects adjudged, according to its best and most enlightened judgment, for the protection of the rights of people and property, and for guidance for the future. With these preliminary remarks, made

to justify the criticism about to be entered upon, and with the simple but earnest desire to correct what seems to be an erroneous exposition of the law on the subject, I proceed to consider the opinion of the court in 95 N. Y.

It is there admitted that the limitation, within which an action could have been commenced on Mead's demand, was six years, with eighteen months added as against the administrators. Six years from what time? Undoubtedly, from the time when the claim became due and payable; at least, there is a very general impression that such is, and always has been, the law (Code Civ. Pro., § 415). Nevertheless, the court there says: "the proceedings here could not be commenced until after the accounting, AND HENCE *the statute did not commence to run until the accounting in 1877*; and yet the same court says: "the claim was due Feb. 11th, 1871." We are not told where this new statute of limitations can be found. Indeed, are there two statutes of limitations of six years for the same claim, one applying to a recovery of it as against personal property, and the other as against realty,—the one to be used as a shield by the administrators, and the other by the heirs at law? If so, where are they?

There are different periods of suspension assigned, but the time of the commencement of running is the same. Did not the statute commence to run *for all purposes* on the 11th of February, 1871? Eighteen months were added on the death of the debtor. Is there any statute, anywhere, declaring a suspension of the running of the statute for any other purpose?

None is found. The Code of 1848 was in force when the debt became due. Section 105 of that Code, for which § 406 of the present Code was substituted, speaks only of an "action," and there is no provision of the former, making the limitations of actions applicable to "special proceedings." That was first done by the Code of 1877, § 414. Hence, the alleged exception of a statutory stay did not apply to such proceedings until that date. By § 3356 of the present Code (L. 1877, ch. 318), neither § 406 nor § 414 went into effect until September 1st, 1874. Hence, if those sections apply at all, such application could not be made until then. The statute, therefore, commenced to run February 11th, 1871, and, assuming that § 406 has no application, continued to run until the death of the debtor, which occurred about a month later, and then ceased to run until eighteen months after the date of the letters of administration, issued April 14th, 1871, when it again attached, and continued to run until February 6th, 1880, when the proceeding was commenced. Thus, at that time, after making all deductions, the period that had elapsed from the time the cause of action accrued, was about seven years and six months; in other words, the claim, on the above assumption, had been completely barred one year and six months, before the creditor commenced his proceeding.

As a rule, statutes are only prospective in their operation, unless they be clearly made retrospective. Section 414 did make the statute of limitations retrospective, with certain exceptions, within which the case under consideration, it is contended, is not em-



braced. It cannot, therefore, be denied that § 406 was operative when the proceeding was commenced, and that it applied to such a special proceeding, in so far only, however, as it was pertinent; but the statute, then in force (3 R. S., 5th ed., 196, § 59), which declared that a creditor might take the proceeding, if it appeared, after the rendering of an account, that there was not sufficient personal property to pay the debts, operated no stay of proceedings on the part of the creditor. He was just as much at liberty to take proceedings for an accounting as the administrators were (*id.*, 178, § 57). Nay, it was the initiatory step for him to take, in order to compel a sale of the real estate (Dayton's Surr., 622, 3rd ed.). If he did not take it, it was his own fault, and he cannot be permitted to take advantage of his own neglect in order to avoid the effect of the statute of limitations. Under such circumstances diligence is required of the creditor (*Mooers v. White*, 6 *Johns. Ch.*, 360, 377). The maxim, *vigilantibus et non dormientibus jura subveniunt*, is as old as the time of BRACTON (Burrill's Law Dict., 592). A party who is entitled to a remedy must be active and vigilant in its prosecution. The maxim has been frequently applied by our courts, under various circumstances (see *Bruen v. Hone*, 2 *Barb.*, 586; *Voorhees v. Seymour*, 26 *id.*, 569; *Greenleaf v. Mumford*, 19 *Abb. Pr.*, 469). In the case at bar, the creditor has suffered ten years to elapse without requiring the executors to account, when he could have done so at any time during at least six years of the period.

Let us illustrate the results to which the *dictum* in

the case of Mead v. Jenkins, to the effect that "the statute did not commence to run until the accounting in 1877," might lead. A person, claiming to be a creditor, presents a claim to the administrators four years after letters were issued, and they reject it on the ground that it has become barred by the statute since they obtained letters. Afterwards they render an account, having cited this creditor, who, having conceded that his claim was barred, does not present it on the accounting, the result of which shows a deficiency of assets to pay the debts. Whereupon the creditor, relying upon the above *dictum*, presents an application to the Surrogate, under § 59 (*supra*), to compel the administrators to sell real estate, to pay his and other debts. Could it be held, the statute being interposed as an objection by an heir, that although the claim was barred when presented to the administrators, yet it was not barred so as to prevent him from maintaining his proceeding, *because* the statute did not commence to run for the purpose of that proceeding until after the accounting? Again, suppose the creditor had brought an action against them, in which they successfully set up the statute in bar of a recovery, and they afterwards, for the first time, rendered an account, could he, thereafter, in face of such an objection, be permitted to maintain such a proceeding as this? And yet, under the doctrine of the Court of Appeals, it would seem that he could. Still again, suppose the administrators of Jenkins never to have rendered any account before February 6th, 1880, when Mead, the creditor, cited them to render an account. Ac-

according to the cases of *Martin v. Gage* (9 *N. Y.*, 398) and *Clark v. Ford* (1 *Abb. Ct. App. Dec.*, 359), the administrators could have interposed the statute of limitations as a bar, and thus have avoided the rendering of an account at all, unless the Surrogate, of his own motion, were to require it; and if he did not, and no account were ever rendered, then the statute, according to the Court of Appeals, would never commence to run, as against a proceeding to sell the real estate, and the creditor could never place himself in a position to recover out of it in such a proceeding.

I cannot believe it to be my duty to follow any exposition of the law of the matter, which would lead to such strange results.

The point on which the case was decided in the Supreme court (27 *Hun*, 570) seems not to have met the approbation of the Court of Appeals. It was there held that the three years, within which a suit could not have been brought against the heirs under 3 R. S., 5th ed., 197, § 53, constituted no part of the period of limitation, within which proceedings to sell, etc., should be instituted. Evidently, the section applies only to the "suit" therein referred to, and has no reference to such a proceeding as this. The 59th section permitted the creditor to make the application to compel a sale as soon as an accounting had been had. If that were completed at the end of nineteen months, the creditor could at once present his application, without waiting for the three years mentioned in § 53 to elapse. That seems perfectly clear. But now, by § 2750 of the Code, the creditor *may*, at any time *within* three years after letters were granted,

present such an application, while by § 1844 he *cannot* maintain an action against the heir or devisee *until* three years shall have elapsed after such grant. Thus there seems to be no connection, in this regard, between the special proceeding and the action.

I may be laboring under a grave error, but I cannot but regard the demand of the claimant in this case as clearly barred by the statute, and therefore his application is denied.

The land is not legal assets, as claimed on behalf of the contestants. It is true that, where lands are directed by a testator to be sold by his executors, ordinarily an equitable conversion of lands into assets is regarded as being effected, dating from his death; but where the sale is directed to be made at a future time, or on the occurrence of a future event, the conversion is not effected until the arrival of the period fixed, or the occurrence of the event. Here the widow is still alive, and there has been no equitable conversion. The property must still be considered as land.

Application denied.

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RUGG V. JENKS.

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CATTARAUGUS COUNTY.—HON. ALFRED SPRING,  
SURROGATE.—June, 1886.

RUGG v. JENKS.

*In the matter of the estate of JONATHAN G. RUGG,  
deceased.*

The section of the Revised Statutes (2 R. S., 84, § 13), declaring that “the naming of any person executor in a will shall not operate as a discharge or bequest of any just claim which the testator had against such executor, but such claim shall be included among the credits and effects of the deceased, in the inventory, and such executor shall be liable for the same, as for so much money in his hands at the time such debt or demand becomes due, and the provision of Code Civ. Pro., § 2552, making “a decree directing payment by an executor . . . . to a . . . . person interested in the estate . . . . conclusive evidence that there are sufficient assets in his hands to satisfy the sum which the decree directs him to pay,” do not authorize the punishment, as for a contempt, of an insolvent executor, who was indebted to the testator, at the time of his death, for a failure, owing to such indebtedness and insolvency, to discharge a legacy, payment whereof has been adjudged by a decree.

Especially should such a stringent remedy be refused where the legatee is a co-executor of the delinquent, and, though aware that the amount of indebtedness charged against the latter did not represent money actually in his hands, omitted to enforce the decree in his favor, as legatee, until the indebted executor, who was originally able to pay, became insolvent.

Matter of Snyder, 34 Hun, 302—distinguished.

PETITION by Jonathan G. Rugg, one of the executors of, and a legatee under the decedent's will, for an order directing that Lemuel S. Jenks, his co-executor, be punished by fine or imprisonment, as for a contempt of the court. The facts appear sufficiently in the opinion.

TORRANCE & BLACKMON, *for petitioner.*

W. S. THRASHER, *for executor Jenks.*

**THE SURROGATE.**—This is a contempt proceeding against Lemuel S. Jenks, one of the executors of the will of Jonathan G. Rugg, deceased, arising out of his failure to comply with the decree entered in the Surrogate's court, directing him to distribute the funds of deceased among the legatees.

The petitioner is one of the executors, and the principal legatee named in the will of testator. The parties to this controversy were appointed executors of the will of deceased in 1878, and have since continued to act in that capacity. At the inception of the trust, Jenks was solvent, and was indebted to the estate of his testator, upon promissory notes and stated accounts, existing in the lifetime of testator, in the sum of ten thousand dollars.

In 1883, the executors filed their account in proceedings to settle the same judicially, and in October of that year a decree was entered in the Surrogate's court thereupon, charging this indebtedness against Jenks as money in his hands, and directing its distribution in accordance with the terms of the will of testator. About seven thousand dollars of the undistributed assets were due to the co-executor, Rugg, the petitioner in the proceeding now pending. Although this decree was entered in the Surrogate's court in October, 1883, yet no transcript thereof was docketed in the county clerk's office until November, 1884. At the time of the entry of the decree in the Surrogate's office, it could have been enforced against Mr. Jenks, and even a prompt docketing of a transcript of the same in the records of the county clerk's office would have insured its collection ; but in Nov-

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RUGG V. JENKS.

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ember, 1884, Jenks was hopelessly insolvent, and at the time of the demand made by the petitioner preliminary, and with a view, to this proceeding he was, by reason of such insolvency, wholly unable to comply with the demand, or pay any part of the sum chargeable to him in the decree. In the account filed, Jenks accounts for all the money he received as executor, and the only question in this case is as to his liability for contempt in consequence of his failure to pay the debt he owed to the estate.

The counsel for Mr. Rugg, in invoking this severe remedy, rely upon the statute providing that "the naming of any person executor in a will shall not operate as a discharge or bequest of any just claim which the testator has against such executor, but such claim shall be included among the credits and effects of the deceased, in the inventory, and such executor shall be liable for the same, as for so much money in his hands, at the time such debt or demand becomes due" (2 R. S., 84, § 13).

Before the enactment of this statute, the appointment of an executor cancelled any claim held by the testator against him, and the only purpose of this statute was to prevent the extinguishment of such claim. To obviate any inconsistency in compelling an executor to sue himself, it was provided that any claim against him should be treated as money in his hands, so that, upon the entry of a decree against him, it could at once be enforceable by execution. The statute was not designed to change the character of a simple contract debt, by making the executor liable to imprisonment or punishment for contempt in case

of his inability to pay the same. The Code afterwards provided that, upon an entry of a decree on a judicial settlement of the account of an executor, the decree should be "conclusive evidence" of the sufficiency of assets to satisfy the same; and then provision was made for the enforcement of the decree by execution, and contempt proceedings if necessary (Code Civ. Pro. § 2552, *et seq.*; Matter of Snyder, 34 Hun, 302).

These statutes were passed to supply an obvious defect in the law—to permit the punishment, by contempt, of trustees who have embezzled and misappropriated the funds of their *cestuis que trustent*. It is a very salutary enactment, but it certainly was not designed to change the nature of a simple contract debt into one punishable as a crime. Such an alarming metamorphosis did not enter the minds of the legislators, in providing this remedy for delinquent executors. An executor who receives property belonging to his testator and misappropriates the same commits an active fraud, and should be punished unsparingly for thus converting the money or property of others. But if he is simply indebted to the decedent,—liable to him in *assumpsit*,—and by some misfortune is unable to pay his debt to the next of kin or legatees of his creditor, the bare fact of his assumption of the duties of executor should not make him amenable to the harsh and drastic contempt process. Suppose that an executor who is indebted to his testator is abundantly responsible at the time when he accepts the executorship, but immediately thereafter becomes insolvent, is he to be made the victim of contempt



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RUGG V. JENKS.

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proceedings in consequence of his inability to pay his debt? A preference is already given to this class of debts, in that no suit is necessary to obtain judgment in favor of the next of kin or persons entitled to the distribution of the estate; and the law did not contemplate, in addition to this, to make the executor a criminal because, forsooth, he cannot pay his debts.

In *Baucus v. Stover* (89 N. Y., 1), the Court of Appeals, in construing the section of the Revised Statutes which I have cited, plainly intimate, at page 5, that an executor would not be liable to be punished for contempt in a case of this kind; and even in the vigorous opinion of Judge FISH, in \*34 *Hun*, 302 (*supra*), and which is cited and relied upon by the counsel for the petitioner, he holds that an executor would not be liable to punishment for contempt where he has accounted for all the moneys he has received, and is sought to be imprisoned for his failure to pay his own debt (see pp. 308, 309; also, *Watson v. Nelson*, 69 N. Y., 537). And this construction fully protects the beneficiaries. If the executor is indebted to the testator, and is in failing circumstances, it would be ground for refusing to issue letters to him, and if he accepts the trust, and one year has elapsed, he can be compelled to account, and the entry of the decree and the docketing of the transcript places them in a situation to enforce the debt, if the executor is responsible.

In this case, there is another reason why executor Jenks should not be imprisoned. The petitioner is the co-executor. He was present at the preparation of the account; knew that these notes and accounts had not been converted into money; knew that they still

existed simply in the form of their original indebtedness, and assisted in computing the sums due and unpaid thereon. He thus knew the statement, that this indebtedness was "cash" in the hands of executor Jenks, was false. Notwithstanding this fact, he permitted the matter to rest, did nothing to enforce the decree, and did not even cause a transcript of the decree to be docketed until after Mr. Jenks had become irretrievably entangled. Now, after this exceeding remissness, after his large legacy has slipped away through his culpable carelessness, by Jenks becoming a bankrupt, he seeks to proclaim his co-executor a criminal. In 1883, cognizant as he was of every fact now known to him, he not only permitted the claim to remain uncollected, but openly aided in the preparation of an account misleading to his co-legatees. If there was any obliquity, any delinquency, he was *in pari delictu*, and should not now be rewarded because his co-partner has become insolvent. Contribution among wrong doers was never favored.

The petition and proceedings must be dismissed, and, as there was a trial on the merits, with seventy dollars costs, and a decree will be entered accordingly.

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CANFIELD V. CRANDALL.

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ALLEGANY COUNTY.—HON. C. A. FARNUM, SURROGATE.—August, 1885.

CANFIELD v. CRANDALL.

*In the matter of the application for the revocation of  
of probate of the will of JOHN CRANDALL, deceased.*

Upon an application, made under Code Civ. Pro., § 2847, to revoke the probate of a will, on the ground of the existence of a later will which was propounded accordingly, it appearing that the latter instrument was a codicil to the former,—

*Held*, that the petition for revocation should be denied, and the codicil being duly proved, be admitted as such.

A disposition made by a will is revoked by a subsequently executed testamentary instrument, making a provision inconsistent therewith, although the latter proves ineffectual in consequence of the inability of the designated beneficiary to take thereunder.

Testator, who died March 20th, 1884, leaving a widow, brother and sister, him surviving, by his will, executed April 2nd, 1871, gave all his property, real and personal, to his wife for life, in lieu of dower; authorized the executors to sell the real property whenever they deemed best for the interests of the estate; and, after the wife's death, gave and bequeathed one half and one fourth of his property, respectively, to the "E." and "T." societies, corporations formed under the act of 1848 (ch. 319), and the remaining one fourth to the "M." society, a foreign corporation. In January, 1884, within two months before his death, he executed a codicil, modifying the will by providing that the three societies should share equally in the remainder. It was contended, in behalf of the domestic corporations, that the provisions of the will, in their favor, must stand, the codicil being a nullity, as to them, because the testator died within two months after its execution.—*Held*,

1. That the "M." society took one third of the real and personal estate, remaining after the life use,—the circumstance that such corporation thus enjoyed a privilege denied to the others constituting an argument to be addressed to the legislature, and not to the court.
2. That the gifts of the will, to the "E." and "T." societies, were revoked by the provisions concerning them, contained in the codicil; which failing, under the statute, by reason of testator's death within two months after the execution of the latter instrument, those societies took nothing.

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CANFIELD V. CRANDALL.

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3. That, the will working no equitable conversion of the realty, the remainder in two thirds thereof was not subject to distribution; while two thirds of the personal estate, remaining after the life use of the widow, belonged to her and the brother and sister, in the proportions prescribed by the statute, in case of intestacy.

CONSTRUCTION of will and codicil on application for revocation of probate. The facts appear sufficiently in the opinion.

HAMILTON WARD, *for petitioners.*

JAMES H. STEVENS, *for executors.* .

L. A. PLATTS, and L. E. LIVERMORE, *for societies.*

THE SURROGATE.—John Crandall, on the 2nd day of April, 1871, while a resident of this county, executed his last will and testament, whereby he gave: “First.—To my beloved wife, Eliza M. Crandall, all my property, both real and personal, during her natural life, in lieu of right of dower; and I hereby authorize my executors to sell my real estate, whenever in their judgment it shall be best for the interests of the estate. Second.—After the death of my wife, I give and bequeath one half of my property to the Seventh Day Baptist Education Society, one fourth to the American Sabbath Tract Society, and one fourth to the Seventh Day Baptist Missionary Society.” He also nominated Ezekiel R. Crandall and his wife, Eliza, to be executors of his will.

The testator died March 20th, 1884, then being a resident of this county, and leaving real property therein of the value of \$3,000, and personal property worth \$4,000. His will was duly admitted to probate in this court, August 8th, 1884, and the executors

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CANFIELD V. CRANDALL.

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named in the will were duly appointed by the Surrogate. Within a year thereafter, Christopher Crandall, a brother, and Mary Canfield, a sister of the deceased, being his only next of kin and heirs at law, filed a petition in this court, in pursuance of §§ 2647-2653 of the Code of Civil Procedure, alleging that the said John Crandall died leaving a will, duly executed, made since the one admitted to probate, and praying that the probate of said will be revoked, and that the later will be admitted to probate.

A citation thereupon was duly issued, and it has been served upon all the devisees, legatees and executors, and they have appeared in this court by counsel. Upon the hearing, it was found that in January, 1884, within two months of the time of the death of the testator, he made a codicil to his will, as follows: "Codicil to my last will and testament, bearing date the 2nd day of April, 1871. In this codicil I hereby expressly confirm my former will, excepting so far as the disposition of my property is changed by this codicil, which change refers to the second item only of said will, changing it so as to read: after the death of my wife, I give and bequeath one third of my property to the Seventh Day Baptist Education Society, and one third to the Seventh Day Baptist Tract Society, and one third to the Seventh Day Baptist Missionary Society. In witness whereof I have hereunto set my hand," etc.

It appearing that the supposed later will is a codicil, the petition asking for the revocation of the probate of the will is denied, and the codicil to such will is admitted to probate. The duties of the Surrogate

would end in this proceeding at the present time, only that all the parties to the proceeding have requested and urged that the Surrogate should construe the will and codicil, the same as if this were the judicial settlement of the accounts of the executors. There being no infants interested in the estate, and as it may very much lessen the difficulties of the executors in the performance of their duties, I have consented to pass upon the various points raised by counsel.

I find that the name, the "Seventh Day Baptist Tract Society" in the codicil is an error, and should be the American Sabbath Tract Society, it being the intention of the testator to make the gift to such society. By evidence admitted outside of the will, it appears there is no society of the name of the Seventh Day Baptist Tract Society, but the American Sabbath Tract Society is managed by persons holding the beliefs and doctrines of the "Seventh Day" Baptist people, and it can be very readily seen how the testator fell into the error in writing the name. Such a misnomer will not defeat the intentions of the testator (*Wigram on Wills*, Prop. V.; *Lefevre v. Lefevre*, 59 *N. Y.*, 434, 440).

The Seventh Day Baptist Education Society and the said American Sabbath Tract Society are domestic corporations, duly incorporated and organized under chapter 319 of the Laws of the State of New York, passed April 12th, 1848. The Seventh Day Baptist Missionary Society is a foreign corporation, and was duly incorporated in the year 1880, under and in pursuance of the laws of the State of Rhode Island, and

is authorized by its charter to take and hold real and personal estate to an amount not exceeding \$100,000. It has not yet received that amount.

The petitioners contend that the gifts to the three societies are void under the sixth section of chapter 319 of the Laws of 1848, providing that "no such devise or bequest shall be valid in any will which shall not have been made and executed at least two months before the death of the testator." Were it not for the statute in question, and chapter 360 of the Laws of 1860, a competent testator might dispose of all his property in such manner as he desired by will. The legislature has deemed it wise that the natural right of man to dispose of his property by will should be abridged in certain cases, one being that a gift by will, to a society incorporated under the act of 1848, must be made at least two months before his decease, and the other that a person having a husband, wife, child, or parent, shall give by his will to any "benevolent, charitable, literary, scientific, religious or missionary society, association or corporation, not more than one half of his or her estate, after the payment of his or her debts." The reasons for such legislation are given in *Hollis v. Drew Theol. Seminary* (95 *N. Y.*, 166, 172), and in numerous cases preceding that.

Counsel for the three societies urges that § 6 does not affect the gift to them, claiming that more than two months elapsed after such devises and bequests were made, before the death of the testator. It is clear that the section cited does not prohibit the Seventh Day Baptist Missionary Society from taking

under the will or codicil, no matter how brief a period of time elapsed between the execution of the will and the death of the testator. The act of 1848 applies only to "any corporation formed under this act," *i. e.*, chapter 319 of the laws of 1848. The Missionary Society was not formed under this act but under an act of another state, which act contains no such prohibition. If I had any doubts of the correctness of this conclusion, *Hollis v. Drew Theol. Seminary (supra)*, would settle them at once. It is true, as urged by counsel for the petitioners, that such construction gives a foreign corporation rights and privileges not accorded to certain corporations of our own. The legislature has power to change this, should it see fit; the courts have not.

Then we are brought to the question: Do the Seventh Day Baptist Education Society and the American Sabbath Tract Society take under a will not made and executed at least two months before the death of the testator? The testator by his will, executed in 1871, after the life use of all his property by his widow, divided it into four shares, two of which he gave to the Seventh Day Baptist Education Society, one to the American Sabbath Tract Society, and the other to the Seventh Day Baptist Missionary Society. Had this instrument remained unaltered down to the time of his death, each of the three societies named would have received this property in the proportions named, subject to abatement, however, so that the three societies did not receive more than one half of his estate after the payment of his debts. One month and twenty-eight days before his death, and while



thoroughly competent to revoke or modify these devises and bequests, he saw fit to change them. The instrument executed many years before did not then express his wishes and will; his property was not disposed of as he desired it to go; his wish then was that each of such societies should receive one third of the residuum of his estate, after the life use by his widow; they should share equally, and not as he had said thirteen years before. He then expressed his wishes by an instrument in writing, duly executed in accordance with the laws of our State. This is the last wish and will made by him, of which the law can take notice.

It is conceded by the learned counsel for the societies that this last legal declaration, called a codicil to the testator's will, was and is a valid instrument as to the Seventh Day Baptist Missionary Society, and that such society takes by it one third of the residuum of the estate after such life use; that it has life and force as to this society, but he urges it is a nullity as to the other two societies, and has no force or power to change the original will and intent of the testator as to the New York State societies. His view is that the gifts to the two societies are not, and cannot be altered by the codicil, unless the testator live two months after the execution of it; in other words, if the testator make a new disposition of his estate, and intend thereby to modify or revoke certain provisions of the earlier will, such cannot be its effect if the new provisions fail. In part I hold with him. As to the Rhode Island society, it is a good gift. As to the two societies incorporated under the act of 1848, it fails,

for the reason that the legislature has said: "No such devise or bequest (to any corporation formed under that act) shall be valid, in any will which shall not have been executed at least two months before the death of the testator."

The will of the testator consists of the two instruments made by him, one executed in 1871, and the other, designated a codicil, executed in 1884. The two papers together expressed his wishes, and made his last will and testament. His wishes, as expressed in such last formal manner were, that each of the three societies should receive one third of the residuum of his estate. Such expression was made at a time when he was competent to say how he wanted his property to go after his death. It was in a different manner than he indicated in 1871. He annulled the provisions in his declaration of 1871, and substituted others; by such change he revoked the gifts to the three societies, made in 1871, and willed that they receive in different proportions. One of these wishes can be respected; the other two must be denied. A statute positive in its terms prevents the two societies formed under the act of 1848 from taking, unless the will giving them the property was executed at least two months before the testator's death. If, at the time the testator made the codicil to his will, he had made a new will, making no mention of the former will, but which contained precisely the same terms and conditions as are found in the will of 1871, as modified by the codicil of 1884, I think very few would contend that the provisions of the will of 1871 were not revoked by the later instrument. That the later instrument pro-

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CANFIELD V. CRANDALL.

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ducing the same result is called a codicil ought not to change its legal status. The whole instruments taken together are the will of the testator: the last will and testament of the testator were made within two months of the time of his decease. Frequently it has been held that the republication of a will by a codicil makes the will speak from the date of the codicil (*Kip v. Van Cortland*, 7 *Hill*, 346; *Brown v. Clark*, 77 *N. Y.*, 375; 1 *W'ms. on Ex'rs*, 216). The statutes, 2 R. S., 68, § 71, and Code Civ. Pro., § 2514, subd. 4, recognize the term "will" to include a "codicil."

2 R. S., 64, § 42, provides that no will in writing, except in certain cases not necessary to notice, nor any part thereof, shall be revoked, or altered, otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed. It is a well known rule, that a revocation may be implied from the fact that a later will is inconsistent with the one theretofore executed. The section of the statute above cited recognizes the right to revoke or alter a will, or certain provisions of it, by a later instrument executed with the same formalities with which the will itself was executed. There is nothing in it which limits it, or hints that any or all of its provisions shall become operative, but simply that the statutory formalities shall be observed. Of course it is implied that such later instrument shall be made by a competent testator. The testator, John Crandall, was competent to revoke or modify his earlier will at the time he executed the

codicil, but a devise or bequest to certain societies could not become operative on account of the statutory prohibition.

Chancellor KENT, in *Walton v. Walton* (*Johns. Ch.*, 269), has said: "Inoperative conveyances, which have failed for want of completion, or from incapacity in the grantee to take, have, in some cases, been held a revocation of a will at law. Lord KENYON observed, in *Shove v. Pincke* (5 *Term Rep.*, 124), that a conveyance, inadequate for the purpose intended, would amount, in point of law, to a revocation, if it showed an intention to revoke the will; and Lord HARDWICKE and Lord Ch. J. ALVANLEY, sitting in equity, have approved of this construction, as those acts imported an intention in the testator to revoke." See, also, 2 *Greenl. Ev.*, § 687; 4 *Kent*, 528, 529; 1 *Jarm. on Wills* (R. & T. ed.), 329-335. The cases are not all consistent with each other, but from an examination of many authorities the rule seems to be that, if the later disposition fail, not from the infirmity of the instrument itself, but from the incapacity of the beneficiary to receive, the prior disposition is revoked.

By the will of the testator, his widow takes the use of all of his property, real and personal, during her life. Upon her death, the Seventh Day Baptist Missionary Society takes one third of his real and personal estate; the remaining two thirds, after the death of the widow, remain undisposed of, and this court must determine to whom this personal property shall be distributed. 2 R. S., 96, § 75, subd. 3, provides that, where the deceased left a will, the surplus

of personal estate remaining after the payment of debts and legacies, if not bequeathed, shall be distributed, in case the deceased leave a widow and a brother or sister, and no parent or descendant, by giving one half to the widow and the whole of the residue, where it does not exceed \$2,000; if the residue exceed that sum, the widow shall take, in addition to the one half, \$2,000, and the remainder shall be distributed to the brothers and sisters.

It becomes necessary to ascertain the nature of the gift to the societies, in order to determine the questions raised. If the testator by his will has worked an equitable conversion of the real estate, so that it was his intention to give the price of the real estate to each one of the societies, it will, like money, be part of his personal estate, and must be distributed accordingly; but if it is not converted, and the society takes as a tenant in common of the real estate, it will descend to the heirs at law. The testator gave his widow all his property, real and personal, during his life—this means the use and income thereof; of real property, the rents, produce or profits of it. He also gave his executors a discretionary power to sell, in the following words: "I hereby authorize my executors to sell my real estate, whenever, in their judgment, it shall be best for the interests of the estate." An absolute direction to sell real estate, even if the time of sale be discretionary, with directions to distribute the proceeds, is an equitable conversion of the property (*Martin v. Sherman*, 2 *Sandf. Ch.*, 341). So where the testator authorizes his executors to sell real estate, and it is

apparent from the general provisions of the will that he intended a sale, the estate will be deemed personal, under the doctrine of equitable conversion, though the power of sale is not in terms absolute (Phelps' Ex'r v. Pond, 23 *N. Y.*, 69; Power v. Cassidy, 79 *id.*, 602, 914; Graham v. Livingston, 7 *Hun*, 11).

But, to cause a conversion of real estate to personal, the will should definitely and decisively fix upon the land the quality of money. A will which merely "authorizes and empowers" an executor to sell is not imperative (Harris v. Clark, 7 *N. Y.*, 242, 260; McCarty v. Deming, 4 *Lans.*, 440, 442; White v. Howard, 46 *N. Y.*, 144, 162; Matter of Fox, 52 *id.*, 530, 536). It has been held that, if the object for which the conversion of real into personal property is directed fail, either in whole or in part, so that the proceeds are not legally or effectually disposed of by the testator, there is a resulting trust *pro tanto* in favor of the heir, and that there is not an equitable conversion (Hawley v. James, 7 *Paige*, 213; McCarty v. Terry, 7 *Lans.*, 239; Betts v. Betts, 4 *Abb. N. C.*, 317, 419; but see 10 *id.*, 274).

There is nothing in this will, indicating that the executors should sell in any event, nor was it necessary that a sale should be made to carry out its provisions. The widow had the use of all the property during her life, and upon her death the three societies would take the residue. The wishes of the testator could as well be carried out without a sale, as with. For convenience, he gave the executors a power in trust. The title to the real estate passed to

the devisee competent to take, subject, however, to the execution of the power in the executors to sell, should they see fit to exercise it. In case of sale, the fund realized would be treated as real property. Hence I hold that two thirds of the real estate, after its life use by the widow, remains as realty, and is not subject to distribution. Upon the death of the widow, and after the payment of debts and expenses of administration and the commissions of the executors, one third of the residue of the personal estate shall be paid to the Seventh Day Baptist Missionary Society; the other two thirds, undisposed of, shall be distributed under 2 R. S., 95, § 75, wholly to the widow if the sum does not exceed \$2,000; if it exceed that sum, she shall take one half of the residue, and \$2,000 in addition, and the remainder shall go to the next of kin of the deceased, being the petitioners herein. There is nothing in the will barring the widow from sharing in the distribution (*Hatch v. Bassett*, 52 *N. Y.*, 359, 362; *Edsall v. Waterbury*, 2 *Redf.*, 48, 51; *Lefevre v. Lefevre*, 59 *N. Y.*, 434, 447). The fact that the widow cannot now come into possession of her distributive share does not affect her right to receive it (*Sweet v. Chase*, 2 *N. Y.*, 73).

Fifty dollars costs shall be allowed to the petitioners, and a like sum of costs to the executors, to be paid out of the estate by the executors, and a decree shall be entered accordingly.

## 124 CASES IN THE SURROGATES' COURTS.

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### MATTER OF CASE.

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ALLEGANY COUNTY.—HON. C. A. FARNUM, SURROGATE.—October, 1885.

### MATTER OF CASE.

*In the matter of the application for probate of a paper propounded as the will of MARY C. CASE, deceased.*

In applying the statute (2 R. S., 63, § 40), which prescribes the formalities essential to the execution of a will, the fourth subdivision of the section, providing that the attesting witnesses must sign their names *at the end* of the instrument, should be as rigidly enforced as the first, which contains a like requirement respecting subscription by the testator.

The paper propounded as decedent's will was written on a half sheet of legal cap, the first page whereof contained the disposing portion, followed by the name of decedent and the beginning of an attestation clause, at the conclusion of which, on the next page, appeared the names of three subscribing witnesses; next came an agreement signed by the legatee to support decedent and her husband during their natural lives; then a clause nominating an executor, and finally a second subscription by decedent. It was contended that the matter preceding the witnesses' names might be deemed a complete and properly executed will; but, the evidence showing that the entire document, with the exception of the several signatures, was written at one time,—

*Held*, that the obvious intent of the decedent was that all the provisions of the paper should constitute her will, and that probate must be refused, on account of the witnesses' failure to sign their names at the end thereof.

Matter of Hewitt, 91 N. Y., 261—followed; Younger v. Duffie, 94 N. Y., 585—distinguished.

As to whether the result would have been different, had the portion of the instrument following the signatures of the witnesses been added after the earlier part was executed and attested—*quære*.

PETITION by Philander B. Case, a son of decedent, for the probate of the will of the latter. The facts appear sufficiently in the opinion.

HENRY L. JONES, *for petitioner*.



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MATTER OF CASE.

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THE SURROGATE.—Philander B. Case, one of the heirs at law of the deceased, has presented to this court, for probate, an instrument, claiming it to be the will of his mother, Mary C. Case. An inspection of the paper shows that the attesting witnesses did not sign their names at the *end* of the will, as required by 2 R. S., 63, § 40, subd. 4.

Had nothing more appeared or been claimed, the Surrogate, very properly, might have refused to hear proofs (Matter of Hewitt, 91 *N. Y.*, 261; below, 5 *Redf.*, 271); but it was urged that the instrument was properly executed and attested and made a complete will, then the clauses following the signatures of the witnesses were added, and subscribed by the deceased, after the paper was so witnessed.

The whole instrument is written upon half a sheet of legal cap paper. The name of the testatrix appears at the end of the disposing part of the instrument, written near the bottom of the first page. Immediately following her signature is the attestation clause, which covers the remainder of the first page and three lines of the second page. Immediately following the attestation clause, the three witnesses subscribed their names. Then follows: "The afore-said Philander B. Case" (the devisee and legatee named) "hereby agrees to care for and support his father and mother, as heretofore done by his mother, during their natural life. In attestation of which he hereby signs his name, Philander B. Case."

"And lastly, I do hereby nominate and appoint my friend J. P. Dye to be the executor of this my last

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MATTER OF CASE.

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will and testament, hereby revoking all former wills made by me. Mary C. Case (her x mark)."

Had this portion of the instrument, following the signature of the attesting witnesses, been written in point of time *after* the witnesses had subscribed their names, possibly the first page of this paper could have been admitted to probate, if *Brady v. McCrosson* (5 *Redf.*, 431) be sound law. It is unnecessary to pass upon this point, for it appears that, in this case, the *whole* of the writing, except the signature of the testatrix, the subscribing witnesses, and Philander B. Case, was made before there was a signing by any person; the matter was canvassed by the witnesses, in the presence of the deceased, whether the witnesses ought not to write their names on the paper after or below the subscription of the testatrix, and the draughtsman remarked that to sign as they were requested would be a good execution.

It is clear to my mind that the deceased intended *all* of the provisions contained in the paper should make up her will, and that to accept the portion preceding her signature and reject that following it, will not accomplish her wishes. This statute has specifically provided that each of the attesting witnesses shall sign at the *end* of the will. The first subdivision of the section containing this provision requires the testator to subscribe his name at the end of the will. Under the first subdivision of the section, the rule has been rigidly and literally enforced by the courts (see *Sisters of Charity v. Kelly*, 67 *N. Y.*, 409; *Matter of O'Neill*, 27 *Hun*, 130; *aff'd* 91 *N. Y.*, 516; *Matter of Hewitt*, 91 *N. Y.*, 261), and

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MATTER OF CASE.

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no good reason is given why the same rule should not be insisted upon, under the fourth subdivision of the section.

Younger v. Duffie (94 *N. Y.*, 534) is not an authority for holding that this instrument was properly executed. In that case, the testator subscribed his name after the attestation clause, and the subscribing witnesses and the notary then signed below his name. The court held that strictly the attestation clause is no part of a will, it not being essential to its validity; but that the testator subscribing his name after it incorporated it in, and made it part of his will. In that case, the statute was strictly followed—the testator subscribed at the *end* of the will, and the witnesses signed their names at the end of the will. The reasoning of Judge EARL, in the Matter of Hewitt (*supra*) fully covers this case, which is but another illustration of the evil results following the attempt made by laymen to give counsel in legal matters of a highly technical character.

Probate must be denied, and a decree will be made accordingly.

KNICKERBOCKER V. DECKER.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SUR-  
ROGATE.—June, 1885.

KNICKERBOCKER v. DECKER.

*In the matter of the estate of NICHOLAS H. DECKER,  
deceased.*

In a special proceeding, instituted under Code Civ. Pro., ch. 18, tit. 5, by a creditor, to procure a decree directing the disposition of a decedent's real property for payment of the debt, where it appears that the property has been already sold, pursuant to a judgment of the Supreme court, foreclosing a mortgage thereon, made by decedent in his lifetime, the invalidity whereof is asserted by the petitioner, though the Surrogate's court is concluded by the judgment in question, the proceedings should not be dismissed, but be kept alive until a reasonable opportunity has been afforded petitioner for attacking, in a competent tribunal, the foreclosure and sale of which he complains.

APPLICATION by Henry Knickerbocker and Henry W. Perkins, partners, as creditors of decedent's estate, for a decree directing the disposition of his real property for the payment of his debts ; opposed by Maria E. Decker, executrix of decedent's will. The facts appear sufficiently in the opinion.

E. SCHENCK, *for petitioners.*

CARROLL & FRASER, *for executrix.*

THE SURROGATE.—This is a proceeding, under title 5 of chapter 18 of the Code of Civil Procedure, for the sale of certain real estate owned by the testator at the time of his death. His executrix has interposed an answer, wherein she alleges that the real estate in question was subject to three mortgages made by the testator in his lifetime ; that one of such

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KNICKERBOCKER V. DECKER.

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mortgages has been foreclosed, and that such real estate has been sold in obedience to a judgment of the Supreme court. The petitioner refers to those mortgages and declares, upon information and belief, that they were given without consideration. This the respondent denies.

Whether the mortgage, whose foreclosure was followed by the sale of the property, was or was not given in good faith, I have no power in this proceeding to determine. I cannot go behind the Supreme court judgment. But there is much force in the suggestion of the petitioner that, however well founded his claim of the invalidity of that mortgage may prove to be, he will be practically remediless if the respondent's motion for the dismissal of his application shall be granted. The petitioner does not ask that a decree be now entered, but simply that the proceedings be kept alive in this court until he has had reasonable opportunity for attacking, in another, the foreclosure and sale whereof he complains.

His application for delay is granted (*Hewitt v. Hewitt*, 3 *Bradf.*, 265).

KURST V. PATON.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—July, 1885.

KURST v. PATON.

*In the matter of the judicial settlement of the account of DAVID PATON, as trustee under the will of JOHN KURST, deceased.*

Testator's will, after bequeathing a life interest in the residue of his estate to his wife for her maintenance, and the maintenance and education of their children until they became self-supporting, directed that, after the widow's death, all such property as then remained be disposed of, and the proceeds be divided "equally among the children I may then have, or those who may be legally entitled thereto." When the will was executed, testator had three children, of whom one died before him without issue, another before testator's widow, leaving a widow and children, and the third, J., survived both his parents.—

*Held*, that J., as the sole survivor of his mother, was entitled to the exclusive benefit of the ultimate disposition made by the will, the intent of the italicized words being that, in the event of the death of all the children in the widow's lifetime, and only in such contingency, the property should eventually pass under the statute providing for distribution in cases of intestacy.

The word, "children," occurring in a will which furnished no evidence of a design to adopt a special and more extended meaning,—

*Held*, to apply only to offspring in the first degree, and to exclude grandchildren, in accordance with the doctrine asserted in *Kirk v. Cashman*, 3 *Dem.*, 242.

UPON the judicial settlement of the account of David Paton, as trustee under decedent's will, John B. Kurst, a son of decedent, claimed the entire residue, which was ready for distribution to the persons entitled. Further facts appear in the opinion.

JESSE K. FURLONG, *for John B. Kurst.*

VAN DUZER & TAYLOR, *for trustee.*

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KURST V. PATON.

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THE SURROGATE.—Upon the accounting of this testator's trustee, a question has arisen as to the construction of the ninth article of his will. The third article gives his widow a life interest in the residue, in trust for her own support, for the support, education and maintenance of their child, Julia, until she shall be able to provide for herself, and also for the support, education and maintenance of any other children that may be afterwards born to them, until such other children shall also become self-supporting. The fifth article directs that, in the event of the death of the widow, before the time shall have arrived when the daughter Julia, and such other child or children as may thereafter be born, shall be able to provide for themselves, the executor shall make provision for such daughter, and such other child or children, until they shall respectively cease to require it. Clause sixth orders the investment of the net income of the estate in the event of the decease of the widow before the youngest child shall arrive at the age of twenty-one. The seventh and eighth clauses are for present purposes unimportant.

The ninth is as follows: "I order and direct that, after the decease of my said wife, and after my youngest child shall arrive at the age of twenty-one years, my executor, or such person as may then legally represent my said estate and the interest of my said children, shall dispose of all such property as may then remain of my estate, . . . . and, after first deducting all necessary expenses, divide the proceeds thereof, together with all other property belonging to my said estate equally *among the children*

*I may then have, or those who may be legally entitled thereto."*

At the time of the execution of the will, in 1858, the testator had three living children, John, Charles and Julia. Of these, John alone is living. Julia, the youngest, died in her father's lifetime, and without issue. Charles outlived the testator, but pre-deceased his mother, leaving a wife and two children, who still survive, and are represented by counsel in this proceeding. John claims the whole of the residue now ready for distribution. The widow of Charles claims such share as she would have been entitled to receive if her husband had outlived his mother, and, without receiving his share in the estate, had died intestate. The children of Charles contend that, under the ninth clause of the will, the proceeds of the residue should be divided either into two equal parts, one half for their uncle John, and the other half for themselves, or into three equal parts, whereof he should be accorded one, and they the two remaining.

It seems to me that the testator, in providing for distribution "equally among the children I may then have, or those who may be legally entitled thereto," *intended* that such of his children as might outlive his widow should enjoy the exclusive benefits of this provision, and *did not intend* that the words, "or those who may be legally entitled thereto," should become operative save in the event of the death of all such children in the lifetime of their mother. In that contingency, and in that contingency only, his purpose as here expressed, was that the property disposed of by the ninth clause should be divided among those persons



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MATTER OF KENDALL.

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who, under the laws of this State, would be entitled thereto in the absence of any testamentary direction for its disposition. There is nothing in this will to indicate that the word "children" is used in any other sense than in that which the law always ascribes to it in the absence of evidence that it was intended to have a special and more extended meaning. I hold, therefore, that that word does not include the children of the testator's son, Charles, and that his son John is entitled to the whole of the proceeds here in dispute (*Kirk v. Cashman*, 3 *Dem.*, 242, and cases cited).

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—July, 1885.

## MATTER OF KENDALL.

*In the matter of the judicial settlement of the account of the executors of, and trustees under the will of ISAAC C. KENDALL, deceased.*

Where a residuary estate, consisting of both productive and unproductive property, was devised and bequeathed to trustees, to apply the income to the use, support and maintenance of specified persons for life, with remainders over, and the entire income was absorbed, and a deficit occurred, during each of several years in carrying the property, until by a rise in values, and sales, a surplus appeared, the Surrogate considered that the respective claims, to such and subsequently accruing surplus, of the life beneficiaries and the remaindermen, should, in the absence of directions in the will to keep the property *in specie* as it stood at the testator's death, be adjusted by ascertaining what amount of income the property would have produced during the period elapsed since such death, if, at the end of a year from that event, the entire residue had been sold, and the proceeds invested in authorized securities.

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MATTER OF KENDALL.

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THE testator died in 1878, leaving some personal property, and real property of great value. He left, him surviving, a widow and ten children, and no child of living or deceased children. By his will, which was dated November 17th, 1873, and admitted to probate April 10th, 1880, after bequeathing to his widow \$5,000 per annum, in lieu of dower or other claims, he provided as follows:

By the fourth clause he gave to four of his children (the issue of his second wife) "one fourth part of the net income of my estate, to be by my executors hereof appropriated for their benefit, share and share alike, in such manner and to such extent in amount, in each year, as my said executors, or a majority of them, may judge best, until said four children shall respectively become of age. After which my said executors shall pay over to each of my said four children, yearly, one fourth part of said net income for and during their respective lives, together with all income, if any, that may have accumulated on their respective shares during their minority. And at the death of each of said children, leaving lawful issue, then the part, the income of which was paid to such child, shall be divided equally among such issue. But if there be no lawful issue, then such part shall revert to and form part of my general estate . . . ."

The fifth clause read thus: "I give, devise and bequeath all the rest, residue and remainder of my real and personal estate, of every name, kind and description, unto my executors hereinafter named, and their survivor," etc., "to have and to hold the same in trust, to and for the uses and purposes here-

## MATTER OF KENDALL.

inafter mentioned, that is to say : To divide the same into six equal parts, and to receive the rents, issues, income and profits of each part, and apply the same to the use, support and maintenance of my six beloved children (the issue of his first wife). one part to each, for and during their respective lives, and at the death of each of said children leaving lawful issue, then the part, the income of which was paid to such child, shall be divided equally among such issue. But if there be no lawful issue, then such part shall be equally divided among the survivors of said six children," etc., etc.

Much of the real property was vacant and unproductive, and subject to mortgages, the interest upon which, with taxes and assessments, exhausted, for the first three years, the income of the productive property, and left a deficit in each year, as follows :

1st year,	.	.	.	.	.	.	.	\$60,688 80
2nd year,	.	.	.	.	.	.	.	10,688 80
3rd year,	.	.	.	.	.	.	.	984 39
Total,								<u>\$72,361 99</u>

In the fourth year there was a surplus of \$5,528.74. At the time of the hearing, there was no person living who had an interest in the question presented, viz., the disposition of this surplus, except testator's ten children.

D. P. BARNARD, *for the executors :*

The question to be decided is whether (1) the executors shall go on and hold the income until it shall be sufficient to extinguish the above deficiency, leaving the children without any income meanwhile ;

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MATTER OF KENDALE.

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or (2) the deficiencies of three years shall not be considered as so much lost from the principal of the estate, leaving the surplus of the fourth and every succeeding year to be divided as income, as provided in the will.

EVARTS, CHOATE & BEAMAN, *for widow and others.*

FRANK L. BARNARD, *for Angelina G. Champlin and another.*

THE SURROGATE.—Upon the question, whether the excess of receipts over expenditures in the fourth year of the administration of this estate may properly be distributed among the beneficiaries of the income of the residue, or should, because of deficiencies in previous years, be retained by the executors as part of the *corpus* of the residuary estate, counsel have referred me to no decided cases.

From such consideration as I have thus far been able to give to the matter, I am inclined to think that, in the absence of express directions by the testator, his estate should be kept *in specie* as it stood at his death—it may be proper to adjust the respective claims of those who are given the income thereof for life, and those who, upon the death of such first takers, will become entitled to the principal, by ascertaining what sum would have been produced as interest or income, if, at the end of a year from the testator's death, the whole estate had been converted into cash, and invested in such securities as are sanctioned by our courts, and by paying over that sum to the life beneficiaries, whether the same shall be more or less than the actual income during the same period (see the discussion of this subject in 2 W'ms on Ex'rs, part 3,

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HAAS V. CHILDS.

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book 3, ch. 4, § 4; Covenhoven v. Shuler, 2 *Paige*, 122; Cairns v. Chaubert, 9 *id.*, 160; Spear v. Tinkham, 2 *Barb., Ch.*, 21; Lawrence v. Embree, 3 *Bradf.*, 364; Kinmouth v. Brigham, 5 *Allen [Mass.]*, 270; Healey v. Toppan, 45 *N. H.*, 243; Minot v. Thompson, 106 *Mass.*, 583).

I am unwilling, however, to direct the adoption of the scheme above suggested, until counsel have been afforded opportunity to discuss it. Briefs may be submitted at any time before July 10th.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—July, 1885.

## HAAS v. CHILDS.

*In the matter of the estate of SOLOMON CHILDS, deceased.*

Though one nominated executor of an alleged will, who is charged by a contestant with the exercise of undue influence, should generally not be appointed, against the latter's objection, temporary administrator pending the controversy over probate, yet where the allegations of such influence are vague and uncertain, *e. g.*, that the same was exerted by "sundry and divers persons unknown," and the objector's share of the estate, in case probate were refused, would be small; considerations of economy may justify the issue of temporary letters to such nominee, especially where the other parties in interest accede.

Cornwell v. Cornwell, 1 *Dem.*, 1—distinguished.

PETITION by Rebecca Childs, the widow of decedent, for a grant, to her, of letters of temporary administration upon decedent's estate; opposed by

Henry W. Haas, a son of decedent by a former marriage. The facts appear sufficiently in the opinion.

KURZMAN & YEAMAN, *for petitioner.*

SIMPSON & WERNER, *for contestant.*

THEO. B. STEELE, *special guardian.*

THE SURROGATE.—The pendency of a controversy over the probate of a paper purporting to be decedent's will, and the fact that the issues of such controversy cannot be speedily determined, make it expedient to put this estate into the hands of a temporary administrator. To this proposition all parties interested assent. The decedent's widow seeks to be appointed to that office. She is the proponent of the paper in dispute, and is nominated therein as its executrix. If it shall be admitted to probate, she will take, by virtue of its provisions, one third of the income of the entire estate; the other two thirds, and ultimately the principal of the one third, will go to the seven children born of her marriage with decedent. By a former marriage, the decedent had a child who survived him, and who is the sole contestant in the proceeding for probate. He alone opposes the present application for the designation of the widow as temporary administrator.

Whether the Surrogate should or should not appoint to that office one who is named as executor in a disputed will, must be decided in each case that presents itself upon its own particular facts and circumstances (*Jones v. Hamersley*, 2 *Dem.*, 286). Other things being equal, considerations of economy

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PUBLIC ADMINISTRATOR V. ELIAS.

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would demand that such person should receive the appointment. When he is charged, however, with exercising undue influence upon the mind of the alleged testator his application has generally been denied (*Cornwell v. Cornwell*, 1 *Dem.*, 1). It is declared by contestant's objections, in the case at bar, that such undue influence was here exerted by "sundry and divers persons unknown." But in view of the vagueness of this allegation, and of the fact that, if the alleged will shall be rejected, and the decedent pronounced intestate, only one eighth of the property of the estate, in excess of the widow's interest, will go to this contestant, I think that the saving of commissions that will result from her appointment justifies me in making it.

There is a wide variance between the contending parties, as to the value of the estate. I must, therefore, direct that testimony be taken in that regard, before I fix the penalty of the administrator's bond. A reference will be necessary.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—July, November, 1885.

PUBLIC ADMINISTRATOR v. ELIAS. •

*In the matter of the estate of ELLIS H. ELIAS, deceased*

In a case where the public administrator of New York county is in charge of an intestate's estate, not *virtute officii*, but under letters issued to him out of the Surrogate's court, the procedure under an application

## 140 CASES IN THE SURROGATES' COURTS.

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### PUBLIC ADMINISTRATOR V. ELIAS.

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by him, for the discovery of property of such estate alleged to be concealed or withheld, is regulated by Code Civ. Pro., §§ 2706-2714, relating to such an application by executors and administrators, generally, and not by L. 1882, ch. 410, § 222, re-enacting R. S., part 2, ch. 6, tit. 6, § 8.

Where an administrator, seeking to discover property of his intestate alleged to be concealed or withheld, alleges that the person to be cited has, in his possession or under his control, specified articles of property which were in the possession or under the control of intestate at the time of his death, an assertion by the respondent of his own title to a portion, only, of such property does not bar all further inquiry, under the provisions of Code Civ. Pro., § 2710, which directs that, "in case the person so cited shall interpose a written answer, duly verified, that he is the owner of said property, or is entitled to the possession thereof, by virtue of any lien thereon, or special property therein, the Surrogate shall dismiss the proceeding as to such property so claimed."

And where, in response to an application by the administrator for an examination of decedent's widow, with a view to discovery of the whereabouts of certain U. S. bonds "of the value of about \$150,000," the respondent answered that decedent, during his life, gave to her from time to time, such bonds to the amount of \$135,000, whereof she returned to him, on different occasions, large numbers, of unknown value, for his temporary use, leaving in her possession, at decedent's death, an amount of the par value of \$30,000, and no more; and that she was advised and believed that she was the owner of the bonds so retained, and of those so returned, if any, not disposed of by decedent before his death, and, as such owner, entitled to the possession thereof,—

*Held*, that the examination must proceed.

Whether an affidavit is an "answer," within the meaning of Code Civ. Pro., § 2710—*quære*.

UPON a contested application for letters of administration upon the decedent's estate, the Surrogate decided that Maggie Elias was the widow of the decedent and entitled to the letters. The requisite official bond not being given by her, letters were subsequently issued to the public administrator, who procured a citation directing the widow to attend and be examined concerning decedent's property. On the return day, she moved to dismiss the proceedings. Further facts appear in the opinion.



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PUBLIC ADMINISTRATOR V. ELIAS.

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CARDOZO & NEWCOMBE, *for the motion.*

L. B. CLARKE, *for public administrator, opposed.*

THE SURROGATE.—On the 12th of May last, the public administrator, to whom the Surrogate lately granted letters as administrator of this estate, filed in this court the affidavit of William M. Elias, which alleged, upon information and belief—1st. That this decedent, at the time of his death, in June, 1881, had in his possession or under his control United States Government bonds of the value of about \$150,000; and, 2nd. That, at the time of the making of such affidavit, such bonds were in the possession or under the control of decedent's widow, Maggie Elias.

The public administrator, upon filing this affidavit, applied for a citation directing said Maggie Elias to appear before the Surrogate at a time and place specified, and to "testify concerning the property of Ellis H. Elias, deceased." Such a citation was duly issued and served. On the day appointed for its return, the respondent appeared by counsel, filed an affidavit whose contents will presently be stated, and moved that the proceedings be dismissed. Shall this motion be granted?

The provision by which the public administrator of this county was formerly authorized to institute, in his official capacity, an inquiry concerning property of a decedent, not satisfactorily accounted for by persons who were about him in his last sickness, was R. S., part 2, ch. 6, tit. 6, § 8 (3 Banks, 6th ed., 128). This provision was re-enacted by § 222 of the Consolidation act (L. 1882, ch. 410). By the act of

April 22nd, 1870 (L. 1870, ch. 359, § 7) executors and administrators in general, in the county of New York, were granted substantially the same rights and privileges, for the discovery of property concealed or withheld, as had theretofore been accorded to the public administrator. By L. 1870, ch. 394, the benefits of chapter 359 were extended to executors and administrators throughout the State. The statute law in this regard remained unchanged until the adoption of the Code of Civil Procedure, and in that Code its provisions were substantially re-enacted (§§ 2706–2714).

It does not clearly appear whether the present proceeding is claimed to be instituted under the Code or under § 222 of chapter 410 of the Laws of 1882. It seems to me, however, that as the public administrator is in charge of this estate, not *virtute officii*, but by investiture of letters of administration issued to him by the Surrogate, the course which he must here pursue for the discovery of property of his intestate's estate claimed to be concealed or withheld is fixed by the Code of Procedure (*Miller v. Franklin Bank*, 1 *Paige*, 444).

The Code provisions upon this subject were amended by L. 1881, ch. 535, and the following words were added at the close of § 2710: “In case the person so cited shall interpose a written answer duly verified that he is the owner of *said property*, or is entitled to the possession *thereof* by virtue of any lien thereon, or special property therein, the Surrogate shall dismiss the proceeding *as to such property so claimed*.”

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PUBLIC ADMINISTRATOR V. ELIAS.

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In the case at bar, the person cited has interposed an answer, in words following: "I am the widow of said Ellis H. Elias. During his lifetime he gave me from time to time United States bonds, and at the time of his death I had in my possession, as a part of said bonds so given to me, about \$30,000. I have no property of said Ellis H. Elias in my possession or under my control. I have property which I received from him. He gave it to me for myself, and I make claim to be the owner of all the property in my possession which I received from him."

Counsel for the moving party makes, as it seems to me, a just criticism upon the allegations of this affidavit. He insists that the respondent does not declare herself to be the owner of the "about \$150,000" whose whereabouts he is seeking to discover. So far as she asserts a claim to any sum whatever, parcel of such \$150,000, she maintains her ownership of no more than "about \$30,000." Her insistence of title to that sum is only a *pro tanto* bar to the petitioner's proposed inquiry. If she had absolutely denied her possession or control of any property whatever belonging to the decedent at the time of his death, it is very clear that such a denial would not have blocked the way to further investigation in this court. By the denial that she has in fact interposed, she has obstructed such investigation only so far as concerns the \$30,000 which she claims as hers.

I must hold therefore that, as regards her possession or control of any property held by this decedent at the time of his death, other than the sum of \$30,000 in United States bonds, this proceeding has not lost

its vitality. The respondent is allowed one week within which to file, if she sees fit to do so, and if the facts will warrant it, an answer which will require the absolute dismissal of this proceeding.

I commend to the consideration of her counsel the petitioner's suggestion, that the paper by which it has been attempted to oust the Surrogate of jurisdiction in this matter is in the shape of an affidavit, and is not strictly an "answer" such as is contemplated by the Code. In case the respondent shall again seek to avail herself of her privilege under § 2710, it may be well for her to assert it in more formal fashion.

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The following opinion was filed, in the same matter, on November 2nd, 1885 :

THE SURROGATE.—In my memorandum of July 16th, 1885, I held that the answer interposed, in behalf of this decedent's widow, to the application of the public administrator, for the institution of an inquiry for the discovery of property claimed to be concealed or withheld, was insufficient, in view of the fact that it only claimed ownership of "about \$30,000," while the applicant sought to discover the whereabouts of "about \$150,000," and that the widow's insistence of title to the smaller sum was only a *pro tanto* bar to the petitioner's proposed inquiry.

An amended answer has since been filed, whose sufficiency is now disputed by counsel for the petitioner. By that answer it is asserted that, for a long time prior to his death, this decedent, from time to time, presented and gave to the respondent U. S. four

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NORTON V. SILLCOCKS.

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per cent. bonds, amounting in the aggregate to about \$135,000, that the respondent, from time to time, at decedent's request, returned to him out of said bonds large numbers thereof for his temporary use; that, as to the number or value of the bonds, so taken by the decedent, the respondent has no knowledge, but that on June 21st, 1881, there remained, out of all the bonds so given and presented to her, bonds which were of the par value of \$30,000, and no more, and that she is advised and believes that she is the actual and *bona fide* owner of said bonds of the par value of \$30,000, and if any bonds are in existence and were not disposed of by said Ellis H. Elias in his lifetime, in excess of \$30,000, and not exceeding \$135,000, she, the respondent, is entitled, as owner, to the possession thereof.

This answer does not seem to me to be sufficient to preclude further inquiry by the petitioner. The respondent must, therefore, attend and be examined, and the order may be entered accordingly.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—July, 1885.

NORTON v. SILLCOCKS.

*In the matter of the estate of FRANCES S. NORTON,  
deceased.*

A petition, by the father and general guardian of an infant, whose estate consists exclusively of a provision contained in the will of a mother,

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NORTON V. SILLCOCKS.

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praying for the exercise, by a Surrogate, of the power, granted by Code Civ. Pro., § 2846, to direct the application of the infant's income to his support and education, should show the amount of net annual income likely to be earned by such testamentary provision, the station in life and accustomed style of living of the decedent's family, and the inability of the father to furnish the necessary means for the purposes mentioned.

PETITION by Thomas Norton, father and general guardian of Jane E. Norton, an infant *cestui que trust* under decedent's will, for an order directing the application, by Valentine Sillcocks, executor therein named, of the income of the infant's interest thereunder to her support and education. The facts appear sufficiently in the opinion.

P. VAN ALSTINE, *for petitioner.*

JONATHAN MARSHALL, *for executor.*

THE SURROGATE.—This is a petition by the father and general guardian of Jane E. Norton, an infant eleven years of age, for an order directing the application of the income of her estate for her support and education. That estate consists solely of real and personal property devised and bequeathed to her by the will of her mother, lately admitted to probate in this court. Of the Surrogate's authority, under § 2846 of the Code of Civil Procedure, to make an order such as the petitioner here asks, there can be no doubt. But in ascertaining what sum, if any, may justly be applied for the infant's benefit, it is proper that I should be advised of certain facts that are not fully disclosed by the petition and answer now before me.

The parties are not agreed as to the amount of net

annual income that the provision for the infant is likely to earn. The station in life and style of living to which the family of the deceased have been accustomed are not disclosed. Nothing definite is shown, as to the circumstances of the petitioner, though the ability or inability of a father to provide for the support and maintenance of an infant child is an important subject of consideration, in determining how far he should be allowed to resort, for such support and maintenance, to the property of the infant himself (Matter of Kane, 2 *Barb. Ch.*, 375; Andrews v. Partington, 3 *Brown, C. C.*, 60; Buckworth v. Buckworth, 1 *Cox Eq. Cas.*, 80; Holtzman v. Castleman, 2 *McArthur*, 555; Tompkins v. Tompkins, 18 *N. J. Eq.*, 393; McKnight's Exr's v. Walsh, 23 *N. J. Eq.*, 136; Haring v. Coles, 2 *Bradf.*, 353; Voessing v. Voessing, 4 *Redf.*, 364; Brown v. Casamajor, 4 *Ves. Jr.*, 498; Matter of Burke, 4 *Sandf. Ch.*, 617, and cases cited in note).

I must order a reference, for the taking of testimony upon these matters. The referee will accompany his report with an opinion, indicating the sum that, in his judgment, should be fixed as an allowance out of the infant's estate, for her support and education.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—July, 1885.

ROBERT v. MORGAN.

*In the matter of the estate of LUCINDA L. MORGAN,  
deceased.*

Where the general guardian of infant beneficiaries of a testamentary trust is in doubt whether, upon a discovery of all the facts, it may not be for the best interests of his wards to ratify rather than to repudiate acts of the trustees, who are accounting before the Surrogate's court, he may properly apply, under Code Civ. Pro., § 2735, for an order requiring the latter to attend and be examined touching the matter, previously to filing objections to the account.

Under Code Civ. Pro., § 2533, permitting the Surrogate "to require a party to file a written petition or answer containing a plain and concise statement of the facts constituting his claim, objection or defence," etc., and Rule 9, which declares that a party desiring to test an account "shall file specific objections thereto in writing," and that "the contest of such account shall be confined to the items or matters so objected to," a statement, in a paper purporting to set forth objections to an account of trustees for infant *cestuis que trustent*, that their guardian "asks an explanation of" an investment, "with liberty to approve the same if it shall be to the interests of the minors," cannot be regarded as an "objection" to such investment.

Accordingly where, in proceedings for the judicial settlement of the account of such trustees, one of the accounting parties, on his examination before a referee, to whom the matter had been referred with full power, refused to answer questions addressed to him, in behalf of the infants, for the purpose of showing the impropriety of an investment which had not been assailed except in the manner described,—

*Held*, that he could not be punished for contempt, on account of such refusal, though he persisted therein after being instructed to answer by the referee.

MOTION by Julia Robert, general guardian of Matthew Morgan and others, infant beneficiaries under the will of decedent, to punish Edward Morgan,



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ROBERT V. MORGAN.

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one of the trustees thereunder, for contempt in refusing to answer certain questions propounded upon a hearing before a referee, to whom were referred the trustees' account, and the objections thereto, filed in a special proceeding for judicial settlement. The facts appear sufficiently in the opinion.

PLATT & BOWERS, *for the motion.*

EVARTS, CHOATE & BEAMAN, *opposed.*

THE SURROGATE.—Henry Morgan and Edward Morgan, testamentary trustees under the seventh article of this decedent's will, having filed their account as such, and petitioned for its judicial settlement, the general guardian of the infant *cestuis que trustent* interposed certain objections thereto in writing. The account in question showed that \$30,000 of the funds of this trust, and \$5,000 of the funds of another, had been loaned, at five per cent. interest, to one Joseph B. Pigot, and that for such loans the trustees held security in the form of a mortgage upon the borrower's undivided one fourteenth share and interest in certain real property in this city known as the New York Hotel.

Upon the filing of the said objections, the Surrogate directed a reference, and accordingly on December 16th, 1884, an order was entered, providing that the "said account and the objections thereto and the issues raised thereby be submitted to Mr. Ogden, for examination as referee," and further providing that such referee should "proceed to take testimony as to the said issues, to examine the account rendered so far as it is affected thereby, to hear and

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ROBERT V. MORGAN.

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determine all claims, questions, and other matters, relating to said accounts properly before said referee, which the Surrogate has power to determine, and to make report thereon," etc. In the course of the trial that ensued before Mr. Ogden, Mr. Edward Morgan, one of the accounting parties, was produced and examined. Certain questions were put to him by contestant's counsel, as to whether, on the day of the loan of \$30,000 to Mr. Pigot, he (Mr. Pigot) paid a like sum to Henry Morgan, or to Morgan and Sons (a firm whereof both the accounting trustees were members), and as to whether the moneys loaned to Mr. Pigot did or did not ultimately reach the hands of the trustees, and as to whether it was or was not their real purpose, in the whole transaction, to acquire for themselves from the trust fund the amount of the Pigot loan.

These questions the witness refused to answer, and he persisted in his refusal after he had been expressly instructed to answer by the referee. It had already appeared from his testimony that the property, which was the subject of the mortgage in question, had been conveyed to Pigot by Henry Morgan, and that, in the mind of the witness, there was no doubt that Henry had made such conveyance for the very purpose of enabling Pigot to borrow money of which he (Henry) could make use in the business of Morgan's Sons.

Under these circumstances, it seems to me that, if the propriety of the Pigot investment can justly be said to have been put in issue by the contestant's objections, the witness was bound to answer all the interrogatories that were addressed to him by contes-

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ROBERT V. MORGAN.

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tant's counsel (*Lathrop v. Clapp*, 40 *N. Y.*, 328). The present proceeding is one wherein he is required to show cause why, for his several refusals to answer, he should not be punished for contempt.

It is contended by his counsel that the referee was given no authority, by the order under which he acted, to inquire into the facts and circumstances connected with the Pigot loan, as no objection had been interposed thereto in behalf of the contestants.

Section 2533 of the Code of Civil Procedure provides that the Surrogate "may at any time require a party to file a written petition or answer containing a plain and concise statement of the facts constituting his claim, objection or defense, and a demand of the decree, order or other relief to which he supposes himself to be entitled. . . . A party who fails to comply with such a requirement may be treated as a party in default."

The 8th Rule of the Surrogate's court of this county is based upon the above cited provision of the Code. It declares that a party desiring to test an account "shall file specific objections thereto in writing," and that "the contest of such account shall be confined to the items or matters so objected to."

In the case at bar, the instrument which purports to set forth the contestant's objections is divided into four paragraphs. Admittedly, the first three have no relation to the Pigot investment. The fourth and last paragraph is in words following: "She" (*i. e.*, the guardian) "*asks an explanation* of the investment of May 20th, 1884, with liberty to approve the same if it shall be to the interests of the minors."

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ROBERT V. MORGAN.

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It seems to me that, within the meaning of § 2533 and Rule 8, the words above quoted cannot, for the purposes of this proceeding, be regarded as constituting an "objection" to the Pigot investment. Those words, indeed, contain a very distinct implication that the guardian of the infants is in doubt whether, upon a discovery of all the facts, it may not prove to be for the best interests of the infant to affirm rather than to repudiate the action of the trustees in respect thereto. In such a situation, the guardian might very properly, had he chosen so to do, have applied, under § 2735, for an order requiring one or both of the accounting parties to attend before the Surrogate and be examined under oath touching the matter of this investment, preliminarily to the filing of objections (Rule 8, *supra*; *Geer v. Ransom*, 5 *Redf.*, 578).

If such an application had been made and granted, and if a referee had thereupon been empowered to take the testimony of the accounting party and report the same to the court, I think it plain that such questions as are here under review would have been clearly material, and that a refusal to answer them would have been justly punishable as a contempt. But under the circumstances here disclosed, the motion to impose such punishment must be denied.

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MACKAY V. FULLERTON.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—July, 1885.

MACKAY *v.* FULLERTON.

*In the matter of the testamentary guardianship of the persons of ANNIE C. KING and others, infants.*

The restrictions upon the authority of a Surrogate's court, to supersede the general guardian of an infant, imposed by Code Civ. Pro., § 2472, which permits the exercise thereof only "in the cases and in the manner prescribed by statute, enable the lawful incumbent of such an office successfully to resist an application for his removal until circumstances have been established which furnish a statutory warrant therefor.

While a general guardian whose authority is derived exclusively from judicial appointment may be deprived of his office by a Surrogate's court, whenever "the infant's welfare will be promoted by the appointment of another guardian" (Code Civ. Pro., § 2832, subd. 6), the power of the court is subject to a narrower limitation as regards a testamentary guardian, who cannot be removed except upon grounds which would justify it in displacing a testamentary trustee (*id.*, §§ 2817, 2858).

APPLICATION for the removal of testamentary guardian. The facts appear sufficiently in the opinion.

A. D. DITMARS, *for petitioner.*

CHRISTOPHER FINE, *for guardian.*

THE SURROGATE.—This proceeding is brought by Donald Mackay, as one of the executors of Elizabeth R. B. King, deceased, for the removal of Phebe Fullerton, the testamentary guardian of Mrs. King's children.

It is provided by the seventh subdivision of § 2472 of the Code of Civil Procedure, that the Surrogate's authority to supersede the guardian of an infant "must be exercised in the cases and in the manner prescribed by statute."

In view of these restrictive provisions, it is manifest that one who is a lawful incumbent of the office of guardian, either by appointment of the Surrogate or by virtue of a testamentary provision, can successfully resist in this court an application for his removal, until such facts and circumstances have been established as furnish statutory warrant for his supersession. (Matter of Kerrigan, 2 *Civ. Pro.*, 334; Ledwith v. Union Trust Co., 2 *Dem.*, 439).

The various causes which will justify the Surrogate in removing *a guardian appointed under title seventh* of the 18th chapter of the Code are fully set forth in the six subdivisions of § 2832. It is declared, in the last of these subdivisions, that a guardian of the person may be deprived of his office, whenever "the infant's welfare will be promoted by the appointment of another guardian."

The legislature has seen fit to restrain the Surrogate's authority as regards *testamentary guardians* within somewhat narrower limitations. He can only direct the removal of such a guardian upon the grounds assigned in § 2858; that is, "in cases where a testamentary trustee may be removed as prescribed in title sixth of this chapter." This is a reference to § 2817, whose second subdivision alone has any possible application to the case at bar. If, within the meaning of that subdivision, this respondent has been

guilty of "misconduct in the execution of her trust," and has thereby become "unfit" to be continued in her office, she must be removed; otherwise, the Surrogate is powerless to displace her.

Now, there are no allegations in this petition that seem to me to require comment, except such as are in some way associated with the shameless behavior of the respondent's son, Richard Butler, towards the children, whom their mother had, by testamentary direction, entrusted to the respondent's care. I am so profoundly impressed with the truth of these revelations, and with the desirability of placing these infants under new conditions, not only for preventing future mischiefs, but for effacing from their minds, if possible, the memory of indignities which they have already suffered, that, if I had power, under the circumstances here existing, to substitute another guardian in place of this respondent, I should not hesitate to exercise it. But have I such power?

It is not suggested that the respondent connived at her son's disgraceful practices, and it is not claimed that she ever heard of them until about the time when they came to the knowledge of the petitioner. Nor does it appear that she knew or had reason to believe that evil consequences were likely to flow from the intimate relations that were allowed to exist between these children of a common household. Her treatment of her son, since the discoveries which gave rise to the present proceeding, has furnished no just cause for criticism. She is taken to task by petitioner's counsel for protesting her belief in the boy's innocence. But her credulity is perhaps not

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KINNAN V. CARD.

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unnatural in a mother, and it does not seem to have betrayed her into any act or omission that can fairly be interpreted as "misconduct in the execution of her trust."

This petition must, therefore, be denied.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—July, 1885.

KINNAN v. CARD.

*In the matter of the judicial settlement of the account of MARY E. CARD, as administratrix, with the will of ALEXANDER P. W. KINNAN, deceased, annexed.*

Testator, by his will, having given the income of the residue to his wife for life, devised and bequeathed, after the death of the latter, one fourth of the estate to each of three children, P., A. and S., their heirs and assigns; adding: "And in the case of the death of either of my said children, leaving issue, *before becoming entitled to his or her portion*, I give and devise the same to the issue of such child *living at the time of my death*, to be divided," etc. A. and S. died during the widow's lifetime, each leaving a child born before the death of the testator, and another born thereafter. The widow having died, a question arose as to the rights of the after-born grandchildren under the provisions of the will.—

*Held*, (1) that the words first italicized referred to becoming *entitled* to possession, and not in interest; (2) that the latter italicized clause qualified "issue," and not "child"; and (3) that, therefore, the shares of A. and S., respectively, belonged to their children in being at the death of the testator.

The Act, L. 1875, ch. 542—providing that payments of every description, made payable or becoming due at fixed periods, under any instrument executed, or (if a will) that shall take effect, after the passage thereof, shall be apportioned, upon the death of any person interested—does not apply to interest upon investments made under the will of one dying before the date indicated, though the instruments of security were executed thereafter.



CONSTRUCTION of will, upon judicial settlement of account of administratrix with said will annexed. The facts appear sufficiently in the opinion.

WORK & McNAMEE, *for administratrix.*

M. MASTEN, *trustee of Peter Kinnan, in person:*

Income accrued, but not due, follows the estate from which it is derived, and belongs to such estate upon the death of the life tenant (*Irving v. Rankine*, 13 *Hun*, 147; *Marshall v. Moseley*, 21 *N. Y.*, 280). L. 1875, ch. 542, has no application.

THE SURROGATE.—By the fourth article of his will, this testator gave his wife the income of his entire residuary estate for life.

The fifth article is in part as follows: “After the death of my said wife I give and devise the one equal fourth part of my estate, real and personal, to my son Peter, his heirs and assigns, and one other equal fourth part thereof to my son Alexander, his heirs and assigns, and one other equal fourth part thereof to my daughter Sophia, her heirs and assigns; and in the case of the death of either of my said children, leaving issue, before becoming entitled to his or her portion, I give and devise the same to the issue of such child living at the time of my death, to be divided among them, share and share alike,” etc.

The testator left, him surviving, his widow and four children, among whom were the three designated by name as beneficiaries in the provision above quoted. Two of those three, Alexander and Sophia, died in the lifetime of the widow, each leaving two children. One

of Sophia's children was born after the death of the testator, so also was one of Alexander's; the other children were in being at the date of the will. The life estate was terminated in May last by the decease of the widow. The accounts of the administratrix, *c. t. a.*, have since been presented for settlement, and I am now asked to determine upon the facts above stated what persons are entitled to share in the distribution.

The question is simply this: Are the two grandchildren born since the death of the testator entitled to share in this estate under the fifth article of the will, or should the two one fourth parts primarily given to Sophia and Alexander be paid respectively to the son of the one and the daughter of the other who were in being when their grandfather died?

In the first place, what is the meaning of the phrase, "before becoming entitled to his or her portion?" Does it mean entitled in interest, or entitled to possession? If the former, then the problem of distribution is solved at once; for, upon that interpretation, both Alexander and Sophia, at the death of the testator, straightway took vested interests, respectively, in one fourth of the remainder after the termination of the life estate. Upon that interpretation, therefore, the contingency has not arisen for which the testator made provision. If, on the other hand, the words, "entitled to his or her portion," must be construed as meaning—entitled to possession, it will become necessary to ascertain the force and signification of the words that follow. The latter of the two constructions seems to me more natural and sensible, and its correct-

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KINNAN V. CARD.

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ness is supported by authority (see *Chorley v. Loveband*, 33 *Beav.*, 189; *Turner v. Gosset*, 34 *Beav.*, 593) Taking "entitled," therefore, to signify "entitled to possession," we find that the testator has made substantially this provision: "If my son Peter or my son Alexander or my daughter Sophia shall die in the lifetime of my wife, and shall leave issue, then the share which would have gone to such son or daughter, had he or she lived to take it, shall go to the issue of such child living at my death."

Now, do the last four words qualify the word "issue" or the word "child"? If they qualify "child," they are either utterly ineffectual and unnecessary, or they are fraught with divers absurdities and contradictions, some of which are pointed out in the brief of counsel for the accounting party. It is more consistent with the grammatical structure of the sentence to treat the word "living" as limiting the word "issue," and such interpretation is, perhaps, open to no objection more serious than this—that it involves a somewhat singular purpose on the testator's part of so limiting the class of persons who should share in his bounty in the character of "issue" of children deceased as to exclude all persons save such as should be in being at the date of his own death. Such a purpose, however, is neither unintelligible nor absurd. I feel bound to hold, therefore, that the one fourth interest primarily given to the testator's son Alexander must be paid to his granddaughter, Elizabeth E. Burnham, and that the one fourth primarily given to his daughter Sophia must be paid to his grandson Alexander.

Another question arises upon the settlement of these accounts. The funds of the estate are invested in bonds, mortgages and other securities upon which interest becomes due at fixed periods. The life tenant died May 10th, 1885, and not long after her death six months' interest fell due on certain bonds and mortgages belonging to the estate. Does any portion of that interest belong to the representative of such life tenant?

A similar question is presented as to the proper disposition of interest on certain other investments in the hands of the accounting party.

It is claimed, by one of the counsel in this proceeding, that these matters must be adjusted in accordance with the provisions of the Apportionment act of 1875 (L. 1875, ch. 542). That act declares that "all rents reserved on any lease granted after the passing of this act, and all annuities, dividends, and other payments of every description, made payable, or becoming due, at fixed periods, under any instrument executed after the passing of this act, *or (being a last will and testament) that shall take effect after the passage of this act*, shall be apportioned so that on the death of any person interested," etc.

Now, this testator died in 1854, and in that year his will was admitted to probate and "took effect." I hold that the statute just cited has therefore no application to the case at bar. The "instrument" to which it refers is the instrument which gives the right to receive (in the present case a will), and not that which creates the obligation to pay (*Knight v. Boughton*, 12 *Beav.*, 312). The respective claims of the

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O'REILLY V. MEYER.

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life tenant's representative and of the remaindermen must, therefore, be determined as if the statute of 1875, had never been enacted; and it follows that no part of the income which has fallen due since the death of Mrs. Kinnan belongs to her representatives (Irving v. Rankine, 13 *Hun*, 147; aff'd 79 *N. Y.*, 636; Tyrrell v. Clark, 2 *Dr.*, 92; Franks v. Noble, 12 *Ves.*, 484; Sherrard v. Sherrard, 3 *Atk.*, 502; Longworth's Estate, 23 *L. J., Ch.*, 104; Marshall v. Moseley, 21 *N. Y.*, 280).

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—August, 1885.

## O'REILLY v. MEYER.

*In the matter of the judicial settlement of the account of FRANK MEYER, one of the executors of the will of JOHN O'REILLY, deceased.*

The court will not allow extraordinary compensation, by way of costs and counsel fees, out of an estate, on the application of the attorney for an accounting executor, upon the ground of trouble experienced by the former in consequence of his client's ignorance of bookkeeping and irregular method of keeping his accounts. Importunities in this behalf should be addressed to the executor, personally.

APPLICATION by attorney of executor for allowance of costs upon judicial settlement of the latter's account; objections whereto were interposed by Rose Ann O'Reilly, decedent's widow and sole legatee under his will.

M. M. BUDLONG, *for executor.*

A. H. GLEASON, *for objector.*

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BAIER V. BAIER.

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THE SURROGATE.—The supplemental affidavit of the executor's attorney alleges, among other things, that the executor "kept his accounts in a very irregular way, not knowing his duties clearly, and being unfamiliar with bookkeeping," and that the attorney, therefore, "experienced great trouble and embarrassment in straightening out the accounts so as to make them presentable on the reference."

I cannot accept these facts as a sufficient ground for awarding larger compensation, by way of costs and counsel fees, than could have been justly claimed if the accounts to which counsel refers had been kept by the executors with clearness and precision. For I should thus be offering a premium to executors for remissness in their duty. They should, at all times, keep distinct and accurate accounts for the inspection of persons interested in the estate (*Blauvelt v. Ackerman*, 23 *N. J. Eq.*, 495). I do not doubt that the attorney has earned all the compensation he claims by way of counsel fees; but the accounting party, out of his commissions, or otherwise, may make good the amount that I feel compelled to disallow.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—August, 1885.

## BAIER v. BAIER.

*In the matter of the estate of JOHN BAIER, deceased.*

The fact that an executor and testamentary trustee is "too busy with his own matters" to continue in the service is not a "sufficient reason"

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BAIER V. BAIER.

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for the exercise, by a Surrogate, of the discretion conferred upon him by Code Civ. Pro., §§ 2690, 2814, to permit the former to resign, especially where the beneficiaries of the trust are opposed to such a course.

PETITION by Margaretha Baier, an executrix of, and one of two acting trustees under decedent's will, for leave to resign as such; opposed by Edward Baier and others, *cestuis que trustent*.

CHAS. GOELLER, *for petitioner* :

Cited Matter of Bernstein (3 *Redf.*, 20).

CHAS. GOEPP, *for Edward Baier and others*.

THE SURROGATE.—The petitioner's application to be relieved from continuing to act as executrix and trustee cannot, within the restrictions of §§ 2690 and 2814 of Code of Civil Procedure, be lawfully granted, unless the Surrogate, in his discretion, shall find that "sufficient reasons" exist therefor. The only reason assigned in this petition is embodied in the general allegation that the petitioner is "too busy with her own private matters, and no longer desires to be busied" with her trust.

Her counsel supplements this claim for relief by pleading her limited knowledge of the English language and a lack of business capacity which amounts to an inability fitly to discharge her duties. He insists that by her retention in office the estate will be incumbered with a "needless appendage."

I find that she had sufficient knowledge of English and of business to claim and receive, under the decrees of October 13th, 1881, and May 10th, 1883, commissions amounting in all to \$1,491.76. Her

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COCHRANE V. WALKER.

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petition expressly asserts that the duties that remain to be fulfilled are of a much simpler character than those which have been performed already; and, as her discharge is opposed by the *cestuis que trustent*, she must continue to play the modest role of needless appendage, until she shows better cause than has yet appeared for being allowed to abandon it.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—August, 1885.

## COCHRANE v. WALKER.

*In the matter of the judicial settlement of the account of JOSEPH WALKER and another, as executors of the will of JOHN C. MORRISON, deceased.*

Testator, by his will, devised and bequeathed the residue of his estate to the executors, in trust to pay, "out of the income thereof," to his widowed daughter, during her life, the annual sum of \$1,600," in quarterly payments, on days named, directing the first payment to be made on the first quarter day occurring after his decease; and made provision for the accumulation of "any surplus or excess of said income, after paying said \$1,600 per annum," and lawful expenses,—with remainder over. Upon an accounting had after the lapse of several years, it appearing that deficiencies of income for certain years had been paid by the trustees out of the surplus received in others, it was, upon objection by certain remaindermen,—

*Held*, that the annuitant was entitled to have all arrearages of lean years satisfied out of the income of after years that were full; and that the objection should be overruled.

Stewart v. Chambers, 2 Sandf. Ch., 382—followed.

UPON the judicial settlement of the account of Joseph Walker and William E. Barnes, executors of



decedent's will, the following provision of that instrument was submitted to the court for judicial construction :

"I give, devise and bequeath all the rest and residue of my estate, real and personal, to my executors hereinafter named and their successors in trust and for the uses and purposes following, namely: (1) Out of the income thereof, whether arising from rents, interest or otherwise, to pay to my said daughter Louisa A. Morris, during her life, the annual sum of sixteen hundred dollars, payable in quarter yearly payments of four hundred dollars each, on the first days of May, August, November and February in each and every year, the first payment to be made on the first of those quarter days which shall occur after my decease, said payments to be made to the said Louisa alone and for her sole use and benefit. . . . . (2) Any surplus or excess of said income, after paying said sixteen hundred dollars per annum, and the lawful charges and expenses of my said executors in the execution of their trusts and duties under this will are, during the life of said Louisa, to be added to the principal of the estate, and after the death of said Louisa the whole estate then remaining, is to be divided and distributed equally to and among my other children, namely: . . . . . share and share alike, and if any of my said children be then dead, leaving children, such children are to have the share of the deceased parent."

In some years, the income of the residuary estate had been less than \$1,600. Afterwards it had exceeded that sum. Objections interposed in behalf of

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COCHRANE V. WALKER.

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certain remaindermen, great grandchildren of the testator, raised the question whether the arrears of the annuity could be paid from the surplus of the full years, or those persons should receive the surplus to whom a surplus was payable by the terms of the will.

BUTLER, STILLMAN & HUBBARD, *for the executors*:

The will permits the executors to apply surplus of net income over \$1,600 in one year to make up a deficiency under that sum in any other. The trust covers the whole property, and the primary object is to give the testator's widowed daughter an income of \$1,600 per annum (cites *Delaney v. Van Aulen*, 84 *N. Y.*, 16). The words "annual sum" only define the quantum or rate of payment. The *whole* income is constituted a trust fund to enable said daughter to receive \$400 quarter-yearly during her life.

ROGER FOSTER, *special guardian for Cochrane infants*:

The provision for the accumulation of the surplus money is clearly void (1 R. S., 726, § 37; L. 1846, ch. 74; L. 1855, ch. 432). The will must, therefore, be construed as if there were no such disposition in it (*Casamaijor v. Pearson*, 8 *Clark & Fin.*, 69, 92). Had the years in which there was a surplus preceded those in which a deficiency occurred, the amount of the latter could not have been recovered from the previous surplus (*Haynes v. Haynes*, 3 *De G., McN. & G.*, 590; *Stelfox v. Sugden*, *Johns. [Eng. Ch.]*, 234, 243). The language shows an intention that arrears of the annuity cannot be made up (*Pierce's estate*, 56 *Wisc.*, 560). The authorities support the contention

(Thellusson v. Woodford, 4 *Ves.*, 227; Casamaijor v. Pearson, *supra*; R. R. Co. v. Schutte, 103 *U. S.*, 118, 143; Scott v. Salmond, 1 *Mylne & K.*, 363; Haynes v. Haynes, *supra*; Foster v. Smith, 1 *Phillips*, 629; Baker v. Baker, 6 *H. L. C.*, 616; Delaney v. Van Aulen, 84 *N. Y.*, 16, 27; 92 *id.*, 627).

THE SURROGATE.—There seems to be no room for doubt that the claim in this testator's will, which directs the accumulation of income is illegal and void; but, if counsel for the executors are right in their contention, there has been no actual accumulation, and no occasion, therefore, has yet arisen for the Surrogate to pass upon the validity of the disputed clause. For that which the contestant claims to have been surplus income, in the years 1882 and 1883, the executors insist belonged to the annuitant, in satisfaction of deficiencies in previous years.

The claim of the special guardian that, by the terms of the will, the excess of income in any given year, over the sum of \$1,600, in no event belonged to the annuitant is supported by numerous citations of authorities and by cogent arguments, which would control my judgment, if I had not chanced to encounter the case of *Stewart v. Chambers* (2 *Sandf. Ch.*, 382). That case is in all respects like the one at bar, and explicitly holds that, until an annuitant, situated like the one whose rights are here in controversy has been fully paid, all arrearages of lean years should be satisfied out of the income of after years that are full. I cannot find that this decision has been overruled or adversely criticised since it was

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QUINTARD V. MORGAN.

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rendered in 1845. It was greatly relied upon by the unsuccessful appellants in *Delaney v. Van Aulen* (84 *N. Y.*, 16). FOLGER, J., in pronouncing the opinion of the Court of Appeals in that case, declared that neither the pleadings nor the facts presented the question whether the plaintiff could claim the application of one year's surplus to a former year's deficiency.

After a re-trial of the action in the Supreme court, and a new appeal, DYKMAN, J., pronouncing the opinion of the General Term in the Second Department, referred to the case of *Stewart v. Chambers*, and while apparently recognizing its authority, held that it was inapplicable to the facts of the case then under review. Judge DYKMAN's opinion does not appear in 26 *Hun*, 533, where the case is merely listed, but it may be found in the appeal papers in the Court of Appeals cases for 1883 (vol. 9, Bar Asso. series).

Objection overruled.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—August, 1885.

## QUINTARD v. MORGAN.

*In the matter of the estate of CHARLES MORGAN,  
deceased.*

The word, "principal," as used in Code Civ. Pro., § 2643, to describe a legatee who may be entitled to a grant of letters of administration with a will annexed, is the equivalent of "general," and means one who is neither specific nor residuary.

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QUINTARD V. MORGAN.

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Where two or more persons are comprised within a class, to "one or more" of whom the Surrogate is required, by Code Civ. Pro., § 2643, to issue letters of administration with a will annexed, no one of such persons has an absolute legal right to receive such letters; and, as between different claimants, he should be appointed who, *ceteris paribus*, has the greatest interest under the will.

Joint letters should not issue to different persons, where there is reason to doubt that their counsels would be harmonious, or that their united action would conduce to the best interests of the estate.

2 R. S., 76, § 34, permitting "administration" to be granted, upon the consent of a person entitled, jointly to him and another not entitled, applies to a case of administration with a will annexed.

APPLICATION by Frances E. Quintard, a daughter of decedent, and a legatee under his will, for a grant of letters of administration, with the will annexed, to herself and others. William H. Morgan, a grandson of decedent, applied for his own appointment, as co-administrator with said petitioner. The facts appear sufficiently in the opinion.

BANGS & STETSON, *for Mrs. Quintard.*

SULLIVAN & CROMWELL, *for administrators and next of kin of widow.*

CHAS. W. DAYTON, *for Wm. H. Morgan and others.*

THE SURROGATE.—Mary J. Morgan, late executrix of this testator's estate, having died on the 3rd of July last, leaving its assets in part unadministered, Mrs. Frances E. Quintard, decedent's eldest daughter and a legatee under his will, has applied for the issuance of joint letters of administration, with the will annexed, to herself, her husband George W. Quintard, and James Rintoul.

The right to receive such letters as are here applied for is granted, by § 2643 of the Code of Civil Procedure, to persons interested in a testator's estate, according to the following order of priority:

"1st. To one or more of the residuary legatees who are qualified to act as administrators.

2nd. If there is no such residuary legatee, or none who will accept, then to one or more of the principal or specific legatees so qualified."

The will of this testator contained but one dispositive clause. That clause gave his entire estate "as provided by the laws of the State of New York in case of intestacy."

The persons who thus became entitled to share in the testator's bounty, and the respective interests that they had in the estate upon probate of the will, were as follows: Mary J. Morgan, widow, 30 ninetieths; Frances E. Quintard, daughter, 12 ninetieths; Maria L. Whitney, daughter, 12 ninetieths; Richard J. Morgan, grandson, 12 ninetieths; Montaigu Morgan, grandson, 4 ninetieths; Wm. H. Morgan, grandson, 4 ninetieths; Laura L. La Montagne, granddaughter, 4 ninetieths; Henry W. Harris, great grandson, 3 ninetieths; Henry H. Wilson, great grandson, 6 ninetieths; Maria L. Harris, great granddaughter, 3 ninetieths.

It is evident that the above named persons, though their interests under the will vary in quantity, are legatees nevertheless of precisely the same grade and character. It cannot be said that any one of them, as distinguished from any other, is a "residuary" or a "specific" legatee. Nor is it true that any of them, as distinguished from any other, is one of the "principal legatees." For the word *principal* when read in the light of the context, is evidently not used as a synonym for *chief* or *most important*, but has the force and effect rather of the word *general*, and is

## QUINTARD V. MORGAN.

meant to be descriptive of all legatees who are neither specific nor residuary.

I hold, therefore, that no one among this testator's living beneficiaries has any absolute legal right, as such, to be chosen in preference to any other, as administrator, *c. t. a.*, of this estate, except as hereinafter indicated. Of those beneficiaries Mary J. Morgan, Richard J. Morgan, Montaigu Morgan and Henry H. Wilson are dead. Henry W. Harris and Maria L. Harris are personally incompetent because of their infancy, and any claim that might be made by their guardian is secondary to the claim of an adult legatee legally qualified (R. S., part 2, ch. 6, tit. 2, § 33; 3 Banks, 7th ed., 2291; *Cottle v. Vanderheyden*, 11 *Abb., N. S.*, 17). The selection must therefore be made from the persons following, unless all of them waive their claims: Mrs. Quintard, Mrs. Whitney, William H. Morgan and Laura L. La Montagne.

The petition of Mrs. Quintard is not, I understand, opposed by Mrs. Whitney. Mrs. Montagne is not herself an applicant for letters. Mr. W. H. Morgan applies for his own appointment as co-administrator with the petitioner.

The practical questions for decision, are, therefore, these: 1. Of the persons entitled, shall I appoint Mrs. Quintard, or Mr. W. H. Morgan, or both? 2. Whoever may be selected among the persons entitled, shall any person *not* entitled be joined in the administration as prayed for by several of the parties in interest?

And first, as between Mrs. Quintard and Mr. Morgan, the claim of the former is supported by this very

important consideration: that she has much the larger interest in the estate. Schouler, in his treatise on Executors and Administrators (§ 124), declares that, when the selection of an administrator, *c. t. a.*, is uncontrolled by statute, the rule is to grant letters "to the claimant having the greatest interest under the will."

Our own statute is founded on a practice which was established by the Ecclesiastical courts, and which is thus expounded by Sir JOHN NICHOL in *Tucker v. Westgarth* (2 *Add.*, 352): that where it is discretionary in the court to grant administration to either of two claimants, it always decrees it, *ceteris paribus*, to that claimant who has the greater interest in the effects to be administered. See, also, to same effect, *Elwes v. Elwes* (2 *Lee's Cas.*, 573). Redfield, in his *Law of Wills*, says (vol. 3, p. 97): "In the English courts of probate, the general rule seems to have been to give administration first to the party entitled to the residue of the goods, and, among those of equal degree, to the one in seniority, other things being equal."

Tried by this test, it is manifest that the claim of the petitioner is superior to that of her rival applicant. Those who have appeared in opposition, and who are themselves legally competent to receive letters, have much less interest under the will than those legally competent who support or approve her application. And while there is on the part of several persons now interested in the estate, including the representatives of Mrs. Charles Morgan, some opposition to Mrs. Quintard's appointment, except upon



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QUINTARD V. MORGAN.

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certain conditions as to co-administration, which she has not indicated her willingness to accept, it is nevertheless true that her application is favored by a much larger interest than the interest which has declared itself on the side of Mr. W. H. Morgan.

I should, therefore, have no hesitation whatever in granting her petition but for the objection that her relations to a proceeding now pending in the Court of Appeals, involving the construction of this testator's will and the ascertainment of the amounts to which his several legatees are entitled thereunder, make her an unfit person to be intrusted with the sole charge of the estate. As to this objection it may be said, in the first place, that the facts on which it is founded do not constitute a disqualification under the statute prescribing the qualifications of administrators. She could insist, in spite of it, upon her absolute right to letters if she were, for example, sole residuary legatee, or if the three persons whose statutory status is the same as her own were all dead, or were all unwilling to administer. The standard of incompetency fixed by the written law can alone be applied in passing upon the qualifications of an applicant to whom that law has given priority. And indebtedness to the estate or personal interest in its administration is not of itself ground of disqualification (*Churchill v. Prescott*, 2 *Bradf.*, 304).

I might, very likely, regard Mrs. Quintard's relations to the controversy in the Court of Appeals as sufficient, other things being equal, to warrant the selection in preference to herself of some person equally entitled, against whom that objection could

not be urged, if there were any such person in existence. But there is not; and as between Mr. Morgan and herself, if either is to be entrusted with the administration to the exclusion of the other, I am disposed to give her the preference.

Now it is not, in my judgment, desirable that letters should issue to the two in conjunction. There is little reason to believe that their counsels would be harmonious, or that their united action would result in measures conducive to the best interests of the estate. Besides, if Mrs. Quintard shall become sole administratrix, I cannot think that the weight of her official authority will become practically oppressive to the other legatees who now object to her appointment. Those objectors are all parties to the proceeding in the Court of Appeals, and are represented by able and zealous counsel.

The issues involved have already been the subject of controversy before a referee, the Surrogate and the Supreme court, and have given rise to searching and elaborate discussion. Under the circumstances, it is extremely unlikely that the parties litigant would or could be helped by the appointment of an administrator in sympathy with their own contention, or would or could be injured by an appointment from the ranks of the opposition.

There remains to be considered the question, whether a stranger to an estate can be granted letters of administration, *c. t. a.*, jointly with a person entitled to such letters under § 2643 (*supra*). It is an every day practice, as regards estates of intestates, to appoint strangers as co-administrators upon the nomina-

tion of the person entitled to letters. This practice is in accordance with the provisions of R. S., part 2, ch. 6, tit. 2, § 34 (3 Banks, 7th ed., 2291), which declares that "*administration* may be granted to one or more competent persons, although not entitled to the same, with the consent of the person entitled to be joined with such persons, which consent shall be in writing and be filed in the office of the Surrogate."

Whether this section applies to cases of administration with the will annexed, does not seem to have been decided in any reported case, and a doubt is now thrown upon the matter, by the fact that, in the main, the practice and procedure in respect to the appointment of the latter class of officers is now regulated by the Code of Civil Procedure, while as to the administration of estates of intestates the provisions of the Revised Statutes are still in force. This doubt will disappear, however, upon close examination.

Section 34 is one of the original provisions of article 2, which, from the time of its enactment, has borne this title: "Of granting letters of administration with the will annexed, and in cases of intestacy." I agree with Surrogate BRADFORD (*Ex parte* Brown, 2 *Bradf.*, 22) in holding that the term "administrator," as used throughout the whole of title 2 of the 6th chapter, was intended to include administrators with the will annexed, except in cases where the context plainly indicates the contrary.

That strangers could be joined in administrations, *c. t. a.*, before the Code came upon the statute book I have no doubt. Now there is nothing in the Code inconsistent with a continuance of that practice, and

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SALOMON V. HEICHEL.

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§ 34 is still unrepealed, and still forms a part of article 2.

It will be observed that the Surrogate has no authority, under that section, to depart from the rule of selection established by § 2643 of the Code, except to the extent that the person entitled shall consent in writing to the appointment of co-administrators.

I cannot, therefore, of my own motion, grant letters to the administrator of the late executrix, however strongly I might be inclined to do so. I may add that, even apart from the restrictions of the statute, the Surrogate would not be justified in forcing, upon a person entitled, an association with a stranger not selected by himself (*Peters v. Pub. Administrator*, 1 *Bradf.*, 200–207, and cases cited).

Letters may issue to Mrs. Quintard, Mr. Quintard, and Mr. Rintoul. If the petitioner shall file a written consent to Mr. Moir's inclusion, he also may be granted letters.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—August, December, 1885.

SALOMON v. HEICHEL.

*In the matter of the estate of THEODORE HEICHEL,  
deceased.*

An appraisement of the personal property of a decedent, made without the previous posting of notice thereof, required by 2 R. S., 82, § 3, is invalid, vitiates the inventory, and entitles the appraisers to no fees. Where the claim of a creditor of the estate of a decedent is evidenced

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SALOMON V. HEICHEL.

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by a judgment recovered against the latter in his lifetime, an answer, filed pursuant to Code Civ. Pro., § 2718, subd. 1, to a petition to compel payment, must, in order to oust the Surrogate of jurisdiction, set forth facts constituting a defence to or avoidance of the judgment.

The provision of Code Civ. Pro., § 1822, as amended in 1882,—prescribing a limitation of six months for the commencement of an action against an executor or administrator, after the dispute or rejection of a claim against the estate, exhibited to the latter “either before or after the publication of a notice requiring the presentation of claims,”—does not apply in favor of a decedent’s personal representative who has omitted to publish such a notice.

HEARING of objections interposed by Harris Salomon, a judgment creditor of decedent, to an inventory of the estate, filed by Josephine Heichel, the administratrix. The facts appear in the opinion.

SIMON SULTAN, *for objector.*

LANGBEIN BROS. & LANGBEIN, *for administratrix.*

THE SURROGATE.—Counsel for a creditor of this decedent objects to the inventory lately filed by the administratrix, upon the ground that the appraisement of the assets of decedent’s estate was made without the previous posting of notice required by R. S., part 2, ch. 6, tit. 3, § 3 (3 Banks, 7th ed., 2294). If such posting may be dispensed with, without impairing the validity of the inventory, why may not also the giving notice to the next of kin or the taking of an oath by the appraisers, and any and all other requirements of the statute? The appraisement is invalid (*Estate of Scofield, N. Y. Daily Reg.*, June 6th, 1879). This settles, so far as this court is concerned, the controversy between the administratrix and appraisers in respect to fees, for it is manifest that the estate must not be saddled with the expenses of an invalid appraisement.

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SALOMON V. HEICHEL.

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The administratrix should begin anew, and should take heed that she complies with the directions of the statute. Let a re-appraisement be had within ten days from date of service, upon the administratrix, of the order to be entered upon this decision, and after such new appraisement, let the inventory be amended as may become necessary.

SUBSEQUENTLY, the same creditor applied to the court, under Code Civ. Pro., § 2717, for a decree directing the administratrix to pay his judgment; whereupon the following opinion was filed, December 19th, 1885:

THE SURROGATE.—The petitioner herein recovered a judgment against this decedent in his lifetime, and now asks for an order directing that such judgment be paid by decedent's administratrix. He alleges that he presented his claim, properly verified, in December, 1884, and that "said administratrix has neither disputed nor rejected" the same.

The respondent has filed an answer whereby—

1. She denies the petitioner's last named allegation, and declares that, on December 12th, 1884, "she formally and expressly rejected" the petitioner's claim;

2. She insists that the petitioner has lost his right to maintain any remedy to enforce payment of such claim, by failing, for six months after the same was rejected, to commence an action for its recovery; and

3. She denies that she has in her possession belonging to the estate any money or property applicable to the payment of petitioner's demand, or any money or property whatever.

*First.* Even if the averment of the administratrix as to the rejection of the claim here in question were undisputed, the mere fact of such rejection would not deprive the Surrogate of authority to direct payment of the petitioner's judgment. To oust this court of jurisdiction in the premises, it is necessary, under Code Civ. Pro., § 2718, subd. 1, that the administratrix should interpose an answer, "setting forth facts which show that it is doubtful whether the petitioner's claim is valid and legal, and denying its validity or legality." As the claim is in the form of a judgment, the facts alleged in attacking it must be such as would operate as a defense to such judgment, or to an avoidance of the same (*Kidd v. Chapman*, 2 *Barb. Ch.*, 414; *Lambert v. Craft*, 98 *N. Y.*, 342). The respondent's answer does not set up such facts.

*Second.* The contention of the administratrix that the petitioner's claim is barred by the short statute of limitations could not be upheld, even if such claim were conceded to have been rejected in December, 1884. For it does not appear that the administratrix has ever published a notice for presentation of claims of creditors, and it is only by such publication that the short statute can be set in operation.

That statute is as follows (Code Civ. Pro., § 1822): "Where an executor or administrator disputes or rejects a claim against the estate of the decedent, exhibited to him *either before or after the commencement of the publication of the notice* requiring the presentation of claims, as prescribed by law . . . . the claimant must commence an action . . . within

six months after the dispute or rejection . . . . in default whereof," etc.

This provision was borrowed from R. S., part 2, ch. 6, tit. 3, § 38 (3 Banks, 6th ed., 97). As it there appears, it contains no allusion to the publication of notice to creditors, but simply declares that a claimant, whose claim is disputed or rejected and is not referred, shall be forever barred from maintaining an action thereon, unless he commence such action within six months. So intimate, however, was the connection between this provision and § 34 of the same title, which provided for notice to creditors, that § 38 was repeatedly declared by the Supreme court to be inoperative, except in cases where such notice had in fact been given (*Whitmore v. Foose*, 1 *Den.*, 159; *Broderrick v. Smith*, 3 *Lans.*, 26; *Hardy v. Ames*, 47 *Barb.*, 413; *Williams v. McIntyre*, 16 *Weekly Dig.*, 351). The same view was taken of this statute by the Court of Appeals, in *Tucker v. Tucker* (4 *Keyes*, 136).

Section 38 was substantially incorporated in § 1822 of the Code, but as originally enacted the latter section expressly restricted the operation of the short statute to claims presented "after the commencement and before the completion" of publication, etc. Mr. Commissioner THROOP, in a note to § 1822 of his edition to the Code, states that the words above quoted were inserted so that the language of the new statute should conform to the construction given to the old, in *Tucker v. Tucker* (*supra*).

Section 1822 was amended in 1882 by substituting in place of the words, "after the commencement and before the completion," the words, "either before or



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HALL V. DUSENBURY.

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after the commencement." The sole object and the sole effect of this amendment, as I interpret it, was to enlarge the scope of the limitation statute, so that in cases where publication had in fact been made, and in such cases only, it should apply to claims presented for payment *before* as well as to those presented *after* the commencement of such publication.

*Third.* The respondent will be given an opportunity to interpose such an answer as is provided for by subd. 1 of § 2718 (*supra*). If she shall fail to do so within five days, I shall direct her to file an intermediate account, showing what property of the decedent has come to her hands, and what disposition she has made of it, with a view to ascertaining whether she ought now to have assets applicable to the payment of petitioner's claim (*id.*, § 2723).

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—August, 1885.

HALL v. DUSENBURY.

*In the matter of the estate of THOMAS DUSENBURY, deceased.*

The attorneys for a defendant who has recovered a judgment for costs against an administrator, in an action brought by the latter, even though conceded to have an equitable lien thereon by reason of their professional services rendered in recovering the same, have no standing, as "creditors," under Code Civ. Pro., § 2717, providing for a summary application for payment of debts, etc.,—the term "creditor," as used in that section, applying only to persons to whom the decedent was indebted in his lifetime.

HALL V. DUSENBURY.

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A Surrogate's court, to which a petition, for a decree directing payment of a debt by an executor or administrator, is presented under Code Civ. Pro., § 2717, is ousted of jurisdiction by the filing of an answer setting up a claim, not palpably unfounded, of an equitable set-off to the petitioner's demand.

As to whether an attorney for a party to an action has an equitable lien upon a judgment for costs recovered in his client's favor, in the absence of an express agreement as to compensation (Code Civ. Pro., § 66)—*quære*.

PETITION by Hall & Blandy, attorneys and counsellors at law, to compel the administrator of decedent's estate to pay to them two judgments for costs, recovered in favor of petitioners' clients, against respondent in his official capacity. The facts appear sufficiently in the opinion.

WM. K. HALL, *for petitioners*.

IRA D. WARREN, *for administrator*.

THE SURROGATE.—William W. Dusenbury, as administrator of this estate, has appeared in response to a citation directing him to show cause why he should not pay to the petitioners, attorneys at law, two several judgments for costs recovered against him as such administrator, and in favor of petitioners' clients, Charles Dusenbury and Benjamin H. Dusenbury.

It appears that the actions, in which such judgments were obtained, were brought by the administrator to recover certain moneys claimed to belong to this decedent's estate, and to be in the hands of the defendants. The petitioners allege that, at the request of the defendants, they acted as attorneys in said actions, and, as their clients were without means, rendered services as such attorneys "without any fee

or reward whatsoever, but relying upon defeating said administrator in said actions, and thus receiving the ordinary costs and allowances thereon." They further allege that the costs directed to be paid by such judgments "belong to them in law and equity, as attorneys of record for defendants in said action."

This application is founded upon § 2717 of the Code of Civil Procedure, and can only be granted in case,—1st, the petitioners are to be deemed "creditors" within the meaning of § 2717; 2nd, the respondent has failed to file a verified answer, setting forth facts showing that it is doubtful whether the claim of the petitioners is valid or legal, and denying its validity; and, 3rd, it has been shown, to the satisfaction of the Surrogate, that there is money or other personal property of the estate applicable to the payment of the claim, and which may be so applied without injuriously affecting the rights of others.

I think that, in all three of these particulars, the petitioners have failed to establish their demand.

*First.* Assuming that, despite the absence of express agreement permitting them to retain, as a reward for professional services, any judgments for costs that might be recovered by their clients against the administrator, they have, by mere virtue of their employment as attorneys, an equitable lien upon such judgment, as effective in all respects as a direct assignment thereof, I do not think that they can be regarded as "creditors" under § 2717. That section was not intended, as I interpret it, to afford relief to any persons, as creditors, except those to

whom the decedent was indebted in his lifetime (Bulkley v. Staats, 4 *Redf.*, 524).

*Second.* The respondent has filed an answer which denies the validity of the claim, and which, within the decision of Hurlburt v. Durant (88 *N. Y.*, 121), puts its validity at issue, so as to oust the Surrogate of jurisdiction in the premises. It is alleged by that answer that the petitioners' clients are indebted to the estate, in an amount largely exceeding the amount of the judgments, and that, even as against the lien of attorneys, the administrator may succeed in establishing an equitable set-off. The Surrogate is not empowered to determine whether, under the circumstances, such right of set-off exists (Stilwell v. Carpenter, 59 *N. Y.*, 414; McNulty v. Hurd, 72 *N. Y.*, 518).

If it were palpably unfounded, the pretence of its existence might be ignored. But that there is some warrant for maintaining it, especially in the absence of an express agreement between the attorneys and their clients that the former should be the owners of the judgments, and in view also of the conceded insolvency of both Charles and Benjamin Dusenbury, see Fitch v. Baldwin (*Clarke Ch. Rep.*, 226); Sanders v. Gillett (8 *Daly*, 183); Davidson v. Alfaro (80 *N. Y.*, 660).

*Third.* It is doubtful, in view of the averments of the answer, whether the petitioners' claim could now be paid without injuriously affecting the rights of other persons interested in the estate (Matter of Charlick's Estate, 11 *Abb. N. C.*, 56; Baylis v. Swartout, 4 *Redf.*, 395).

For these causes, the petition must be dismissed.

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MATTER OF ROBERT.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—August, 1885.

MATTER OF ROBERT.

*In the matter of the judicial settlement of the account of CHRISTOPHER R. ROBERT, as executor of the will of CHRISTOPHER R. ROBERT, deceased.*

The word, "indebtedness," is not exclusively a term of legal technicality, and does not always involve the idea even of pecuniary obligation. Like that of any other word used in a testamentary paper, its signification is open to construction; and it may be necessary to scrutinize the provisions of the testator's will, and even the condition of his estate, and his relations to the objects of his bounty, in order to ascertain the sense in which he has seen fit to employ it.

The power of incorporating the contents of extraneous papers, by suitable words of reference in a will, is undoubted, and subject only to the limitations, that the party asserting such power to have been exercised must show the papers in question to have been in existence when the will was executed, and identify them as those to which the testator referred.

*Dyer v. Erving*, 2 *Dem.*, 160—adhered to.

Testator died in October, 1878, leaving four children, him surviving, and a will, whereby he divided his residuary estate into fiftieths, which were bestowed, in specified proportions, upon those children and an institution bearing his name. The instrument also provided that "all moneys or indebtedness which shall appear upon any inventory or ledger or books of account" kept by him or under his direction, "charged as due" to him from either of the beneficiaries, during his lifetime, "and as an outstanding or unsettled account" at the time of his decease, should be deducted from the share or portion of the person concerned.

It appeared that, for many years before his death, decedent was accustomed to keep formal books of account, containing a detailed record of his business transactions, and, during at least thirteen years preceding the execution of his will, had annually prepared a paper, styled by him an "inventory," showing the nature and value of his property. It was not seriously disputed that, under the circumstances set forth in those books and papers, a son, F., had received from testator \$20,000, and

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MATTER OF ROBERT.

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that the latter had expended, for the benefit of a daughter, J., \$50,000; none of which moneys had ever been restored to the estate.

By numerous entries, *all made before the will was executed*, the testator had included these items in the list of his "assets," although they were generally afterwards deducted, from the "total assets," as "unproductive" or "unavailable property," leaving a balance which was described as "net" or "available assets," etc; while, in the "inventories" of 1871, 1874 and 1875, the same items were finally again added to the available assets, as "amounts due" from F. and J., and included in the "amount for distribution." Upon the day book of 1864, was an entry concerning the \$50,000 item expended for J., stating: "I charge the amount to her," etc.; and another to the effect that the \$20,000 had been "advanced to F., on account of his portion" of the estate.—

*Held*, upon a view of the whole will, and the books and papers therein referred to, that the contested items represented an "indebtedness" to testator from F. and J., respectively, within the meaning of the will, and that their portions abated accordingly.

Robert v. Corning, 23 *Hun*, 305; s. c., 89 *N. Y.*, 241—explained; Rogers v. Daniell, 8 *Allen*, 343—distinguished.

HEARING of exceptions to report of referee to whom were referred the account, and objections thereto, filed by executor, in proceedings for judicial settlement. The facts appear sufficiently in the opinion.

PLATT & BOWERS, *for executor.*

GRAY & DAVENPORT, *for Frederick R. Robert.*

CHARLES F. STONE, and F. N. BANGS, *for Mrs. Corning.*

SHEARMAN & STERLING, *for Robert College.*

THE SURROGATE.—Christopher R. Robert died in October, 1878, leaving him surviving four children, Christopher, Howell, Frederick and Jane.

By the fourth article of his will, executed in January previous, he provides that his residuary estate shall be divided among his children, above named, and an educational institution founded by him,

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MATTER OF ROBERT.

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and known as "Robert College" of Constantinople ; such division to be made in the following proportions : twelve fiftieths to Christopher, twelve fiftieths to Howell, eleven fiftieths to Frederick, ten fiftieths to Robert College, and five fiftieths to Jane.

The sixth article of his will is as follows :

"All moneys or indebtedness which shall appear upon any inventory or ledger or books of account kept by me or under my direction, charged as due to me from any or either of my said children or Robert College of Constantinople, during my lifetime, and as an outstanding or unsettled account at the time of my decease (whether with or without security), shall be considered as forming part of my estate mentioned or referred to in the fourth article of this my will, and a discharge from such indebtedness by my executors shall be deemed and taken as an equivalent of an equal amount paid such college, child or children, on account of its, his, her or their share and portion under this will ; and my executors are hereby directed to deduct the amount of such indebtedness from such respective share or portion ; but no interest is to be charged upon or added to any such indebtedness, except in case a bond, note or other obligation securing such indebtedness, be found among my assets, upon which said bond, note or obligation interest has been paid or charged ; in which case the said indebtedness shall continue to be charged with interest. Any items or charges which may appear in any account of my private, personal or family expenses shall not be included or charged as such indebtedness. Nor shall any moneys which shall appear on my books

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MATTER OF ROBERT.

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charged to either of my said children to a furniture or allowance account be debited to such child on the settlement of my estate, but the same is considered as a gift made by me to such child during my lifetime."

Upon certain inventories, ledgers and books of account kept by the testator or by his direction, appear two items that are the sole cause of the present contention; one, an item of \$50,000, associated with the name of Mrs. Corning, the testator's daughter Jane; the other, an item of \$20,000, that concerns his son Frederick.

It is claimed by the executor, whose account is now before me for judicial settlement, that these items are "moneys or indebtedness charged as due," etc., within the meaning of article sixth (*supra*); that they should accordingly be reckoned as a part of the distributable assets of this estate, and, upon the division of those assets into fiftieths, should be respectively charged to Mrs. Corning and Frederick Robert, as an equivalent of so much money actually paid to them on account of their interest as residuary legatees.

It is insisted, in opposition, that the sixth article of the will does not cover, and was not meant to cover, either of these disputed items, and that, within the meaning of that article, neither of them represents an "indebtedness" to the testator. The latter contention was sustained by the referee to whom were submitted the issues of this accounting. Shall his report be confirmed?

At the threshold of this inquiry, it is important to consider whether, in whole or in part, the questions involved have already been adjudicated. There has



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MATTER OF ROBERT.

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been tried and determined at Special Term of the Supreme court, before VAN BRUNT, J., an action for the construction of this will. In that action, the validity of the sixth article and, to some extent at least, its true interpretation were subjects of consideration. The meaning ascribed to it by VAN BRUNT, J., was subsequently accepted as correct both by the General Term of the Supreme court and by the Court of Appeals.

It is claimed by some of the counsel in this proceeding that the Supreme court determination has definitively established two propositions:

A. That, although the testator's inventories, ledgers or books of account contain entries of amounts "charged as due," etc., such entries will not of themselves warrant the inclusion of such amounts among the distributable assets of the testator's estate, and the application thereof to the shares of the persons against whom they are respectively "charged as due;" but that such inclusion and such application can be justified only by proof that such entries are true entries, descriptive of transactions that have actually taken place.

B. That the word "indebtedness" is a technical term, which must ordinarily be interpreted according to its strict legal signification, and that its signification as used in the sixth article of the will is in no respect enlarged, either by the fact of its association with the word "moneys," or by any evidence that the testator has otherwise afforded of his intention to give it a wider scope than is generally accorded to it.

The referee has reported that, in his opinion, the

judgment in the Supreme court action is not decisive of the present contention, and is not pertinent, indeed, to the issues now to be determined. It appears, from the pleadings and papers in that action, that the sixth article of this will was submitted for judicial construction because of doubts respecting its validity. There was thought to be some ground for insisting that the testator had undertaken therein to give full and absolute testamentary efficacy to such inventories, accounts and entries, as, not being in existence at the date of his will, he might thereafter cause to be prepared in his lifetime. It was, of course, conceded on all hands that, if the provision in question involved of necessity this unwarrantable assumption of authority, it was utterly invalid. To sanction such an exercise of testamentary power, would be in effect to permit a testator to revoke or alter at pleasure his formally executed will, in utter disregard of those statutory requirements without which no revocation or alteration can be made effective.

If, on the other hand, such sixth article could be fairly construed as directing that the amount of the legacies given by article four should be subject to reduction, from time to time, after the execution of the will, in case moneys or other property should under certain specified circumstances be advanced by the testator, to or in behalf of the legatees, and in case, also, an entry or record of such advances should be made in the books and papers in such sixth article specified, then that sixth article could be upheld as in all respects valid and effectual.

Now, as I understand their language, the learned

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MATTER OF ROBERT.

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judges, who respectively pronounced opinions at Special and General Term of the Supreme court and in the Court of Appeals, simply meant to declare that this testator did not, by the sixth article of his will, seek to achieve the legal impossibility of reserving to himself the varying of his testamentary dispositions by the mere subsequent creation or alteration of unattested instruments. And I agree with the referee in thinking that, in all that VAN BRUNT, DAVIS, and RAPALLO, JJ., have said respecting the inefficacy of mere book entries to affect the testator's scheme of distribution under his will, they probably had in mind such entries only as were made, or as might have been made, by the testator or by his authorized agents, *after* the will was executed. In point of fact, it was *before* that date that every entry was made with which we are concerned in the present contention. This circumstance was not alleged in the pleadings, and was not disclosed by the evidence in the Supreme court action. Whether, therefore, entries that were made *before the execution of the will*, as to "moneys or indebtedness charged as due" in any "inventory, ledger or books of account" kept by this testator, can be regarded as sufficient of themselves, and without proof of the actual transactions which they profess to record, to authorize the inclusion in the assets of this estate of the sums specified in such entries, and the deduction of those sums respectively from the share or portion of the persons to whom such entries relate, is a question that neither the Supreme court nor the Court of Appeals has distinctly and formally determined.

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MATTER OF ROBERT.

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In *Dyer v. Erving* (2 *Dem.*, 160), I recently had occasion to consider how far a testator can give to papers not physically connected with his will, a testamentary efficacy. I adhere to the opinion there expressed, that the power of incorporating the contents of extraneous papers by suitable words of reference in the will itself is undoubted, and that it is subject only to these limitations: The paper sought to be incorporated must be shown to have been actually in existence at the time the will was executed, and to be the selfsame paper which the testator by his words of reference designed to indicate.

Within those restrictions it is possible, I take it, for a testator, at the time of executing his will, to give precisely the same effect to the provisions of an extraneous paper, itself unattested, as he is able to give to the provisions of the will itself. The language of RUGER, Ch. J., pronouncing the opinion of our Court of Appeals in the Matter of O'Neil (91 *N. Y.*, 516), may, perhaps, indicate a disposition in that court to narrow to some extent the scope of referential words in testamentary papers; but the intimation is *obiter*, and there is nothing in the decision which conflicts with the proposition above stated. I am clear, therefore, that it was in the power of Mr. Robert, when he executed this will, to make such reference therein to entries *then existing* upon his inventories or books of account, and associated with the name of any of his children, as to constitute the sums specified in those entries a charge against the portion of his estate which he allotted to such child by his will; and to make that reference, too, in such terms that, in any controversy over dis-

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MATTER OF ROBERT.

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tribution, the question whether the entries were true or false, would be utterly immaterial. This view is not at odds with anything that is said either in *Robert v. Corning* (23 *Hun*, 305; s. c. on appeal, 89 *N. Y.*, 241) or in any other New York case that has fallen under my observation.

I am not, however, in accord with the referee, in the opinion that the Supreme court action has resulted in no determination that must here be regarded as *res adjudicata*; and for this reason—the testator has not contented himself with saying: “All moneys or indebtedness which *now* appear in entries upon any inventory or ledger or books of account, etc., charged as due, etc., shall be considered,” etc.

Instead of the word “now,” or some equivalent word or phrase calculated to exclude all such entries as were not in existence at the date of the will, he has used the word “shall,” which is broad enough to cover not only the entries then existing, but such entries as might be made thereafter. He has not used one form of words to declare his intentions with reference to entries already made, and another form of words to declare his intentions respecting entries that might be made thereafter, but the very same words are set to do duty for both classes of cases. Now, the courts that have determined *Robert v. Corning* have, as it seems to me, put *upon those words* a distinct and definite interpretation. They have adjudged that the expression, “indebtedness charged as due,” in article six, does not simply mean a mere book entry of an item in such entry styled an “indebtedness,” but that it has a dual significance, involving the ideas,

(1) of indebtedness (whatever that word may mean as used by this testator) in point of fact, and arising from some actual transaction; and (2) of a written entry relating to such indebtedness, and charging the same as due.

It is true, as has been stated already, that, in thus defining the meaning of the phrase in question, it was entries after the will, and not entries before, that were under judicial consideration. And it is quite possible that if, in the construction suit, it had clearly appeared that, between the making of the will and the death of the testator, no entries had in fact been made such as are contemplated by the sixth article, the court at Special Term might have interpreted that article in accordance with the decision of the Master of the Rolls, in *Quihampton v. Going* (24 *W. R.*, 917), and might accordingly have held that entries which existed at the date of the will, and which created charges against the testator's children, should be deemed sufficient, of themselves and without proof of their accuracy, to justify a corresponding charge against such child's distributive share.

But, under all the circumstances, I do not feel warranted in holding that, even in its application to entries made before the execution of the will, the phrase "indebtedness charged as due," has any different meaning from that which the Supreme court and the Court of last resort have already ascribed to it. In so far, therefore, as this disputed phrase has, for any purpose, been defined in *Robert v. Corning*, I feel bound to adopt that definition for the purposes of this accounting.

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MATTER OF ROBERT.

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But I refuse my assent to the contestants' second proposition, heretofore designated as "*B.*" I hold that, for solving the questions here in dispute, the judgment in the suit for the construction of the will has made this contribution, and this only—it has established that the two items of \$20,000 and \$50,000 are not to be regarded as part of the testator's assets, and are not, in the judicial settlement of the executor's accounts, to be taken as part payments respectively of Frederick's ten fiftieths and Mrs. Corning's five fiftieths, unless they are: (1) as a matter of book entry, and (2) as a matter of fact, items of indebtedness, *within the meaning of that word as used by the testator.*

The contestants do not seriously dispute that Frederick Robert, under the circumstances that are set forth in the inventories, ledgers and books of account, received from the testator the sum of \$20,000, which was never repaid in the testator's lifetime, and has never since his death been restored to the estate. Nor is it seriously disputed that, at the time indicated in such inventories, ledgers and books of account, the testator expended \$50,000 for the benefit of Mrs. Corning, and that the same never thereafter found its way into the assets of the estate. I find, upon the evidence, that those amounts were in fact respectively applied by the testator to the use of his son Frederick and his daughter Jane, in the manner hereinafter indicated.

The chief contention of the contestants in respect to these two items is, that they are not items of "indebtedness" within the meaning of article six, but

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MATTER OF ROBERT.

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are mere gifts or advances which should not be considered in adjusting the shares of the residuary legatees under the will. It is claimed, too, that, in the suit for construction, there was assigned to this word "indebtedness" a definite and precise meaning, which the Surrogate is here bound to recognize and admit.

Let us first consider the latter proposition.

Said Judge VAN BRUNT, at Special Term (case on appeal, fol. 93): "It would seem from this paragraph" (that is, from article six) "that the testator simply intended to have it understood that any moneys which he advanced to his children, and which he charged in his books of account, were to be treated as advances and not gifts. There is nothing in this clause which precludes the idea that the person against whom the charges were made had not the right to prove that *no indebtedness existed*. In fact, the whole phraseology shows that it was *only existing indebtedness* which was to be deducted, if found charged on the testator's books, and that the charges in the books were not to be arbitrarily deducted; but, as I have said, they must have their foundation in the *indebtedness*."

DAVIS, P. J., delivering the opinion of the General Term (Robert v. Corning, 23 *Hun*, 305), said: "The sixth provision of the will was, we think, only intended by the testator to determine what kinds of indebtedness of his children and of Robert College should be treated as advances. In substance, it directs that none which does not appear upon the inventory or ledger or books of account kept by him, or under his direction, charged as due to him, shall be consid-



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MATTER OF ROBERT.

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ered as an indebtedness forming part of his estate. Or, in other words, he meant to say that only advances or *actual indebtedness* which had taken the forms prescribed should be treated as advances, to be taken from the share or portion of his several legatees under the will. The *indebtedness* must be *actual*."

The Court of Appeals, ANDREWS, Ch. J., delivering its opinion, said (*Robert v. Corning*, 89 *N. Y.*, 241): "We think the sixth section of the will is valid within the rule that a testator may direct that the amount of a legacy, once completely fixed by the will itself, shall be diminished *by events actually occurring as matters of fact*, but not by an unattested testamentary writing, disconnected from any actual occurrence. The sixth section was, we think, intended to provide simply, that any *actual indebtedness*, found charged concurrently therewith on the testator's books of account, should go in diminution of the payments to the several legatees as a part of their shares respectively." Now, I do not understand that, by thus coupling the word "actual" with the word "indebtedness," these learned Judges designed to define, or in any manner to describe or illustrate the meaning which should be accorded to the latter term in Mr. Robert's will. It is argued that, by their frequent use of the expression "actual indebtedness," they intended to indicate such an obligation of the legatee to the testator as would constitute an indebtedness in the strict legal sense of that word, and that I must, accordingly, thrust aside, as irrelevant and immaterial, any evidence that might be gleaned from the

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MATTER OF ROBERT.

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will itself, or from the inventories, ledgers and books of account to which the will refers, as to the sense in which that word "indebtedness" is employed by the testator. I see no just ground for the maintenance of such a position. There was not the slightest occasion for defining the word "indebtedness" in passing upon the validity of article six, and neither the Supreme court nor the Court of Appeals was in possession, or could have supposed itself to be in possession of certain facts and circumstances absolutely essential for arriving at a just and proper interpretation of that expression. The actual pecuniary relations between the testator and the legatees, whose interests are involved in this accounting, were not disclosed by the pleadings or evidence in that action; the ledgers, books of account and inventories mentioned in the will, made by appropriate words of reference a part of that instrument, and as necessary, therefore, for its true interpretation as any one of its own clauses, were not before the Supreme court or the Court of Appeals. The word "indebtedness" is not exclusively a term of legal technicality. It has at times a signification far broader than the law dictionaries assign to it, not even involving of necessity the idea of money obligation. Like any other word, therefore, which is used in a testamentary paper, its signification is open to construction, and it may be necessary to scrutinize the provisions of the testator's will, and even, under some circumstances, the condition of his estate and his relations to the objects of his bounty, in order to ascertain the sense in which he has seen fit to employ it. For it is the duty of the court in

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MATTER OF ROBERT.

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all cases to interpret a testator's words according to the meaning which he himself has chosen to assign to them.

Said CHURCH, Ch. J., pronouncing the opinion of the Court of Appeals in *Hoppock v. Tucker* (59 *N. Y.*, 209): "The substance and intent, rather than words, are to control. The intention of the testator is the first and great object of inquiry, and to this object technical rules to a certain extent are made subservient. . . . The language used" (referring to the particular language then under consideration) "is in a certain sense equivocal. Standing alone, the law would give it a certain meaning, but it would do so only in obedience to a supposed intent. If by the light reflected from other provisions a different intent is discoverable, the reason of the rule fails and a different result is reached."

Said ALLEN, J., speaking for the same court, in *Lytle v. Beveridge* (58 *N. Y.*, 598): "The intent is to be gathered from the will. . . . Words which have acquired a fixed legal meaning must be intended to have been used in the sense which has been impressed upon them, *unless it is apparent that they were used by the testator in a different sense.* . . . The doctrine that the intent of the testator is the guiding and controlling rule of interpretation requires not unfrequently a disregard of the usual technical meaning of words and phrases, and, when necessary, such technical meaning must yield to the evident intent of the testator. . . . There is no rigid rule of law to the effect that words shall only be used in one certain sense, or requiring courts to give language

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MATTER OF ROBERT.

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the same interpretation and effect under all circumstances and in every connection. The infinite variety of circumstances that may occur, distinguishing one case from another in the use of the same words and phrases, renders it impossible to give an absolute and unbending rule for the interpretation of language applicable to all cases."

In the recent case of *Phillips v. Davies* (92 *N. Y.*, 199)—a suit for the construction of a will—FINCH, J., commenting upon an interpretation suggested by one of the counsel, said: "If such was the real meaning and intention of the testatrix, if an examination of the whole will forces that conviction, if its plain and definite purposes are endangered by inapt or inaccurate modes of expression, and we are sure that we know what the testatrix meant, we have a right and it is our duty to subordinate the language to the intention. In such a case the court may reject the words and limitations, supply them or transpose them to get at the correct meaning."

Whether in the will now under consideration, and by the extraneous documents and papers which it incorporates into its own body, this testator undertook to assign for himself a meaning to the word "indebtedness," no other court than this has ever, so far as I know, had either the means or occasion to determine. All that other courts have adjudged is this: Whatever may be the meaning of the word "indebtedness" as used in the will of Christopher R. Robert, a mere entry in his books and papers of a sum charged as due to any of his children, or to Robert College, shall not of itself be taken as sufficient evidence of an

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MATTER OF ROBERT.

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“indebtedness” to set in motion the sixth article of the will, for the diminishing of the distributive shares of such children or of such college ; but, before that clause can become operative, such entry must be supplemented by some proof that the transaction or occurrence recorded by such entry, and claimed to constitute or create the indebtedness, actually took place.

If my meaning is not entirely clear, I may make it so by an illustration. If upon all the evidence there appeared to be no foundation in fact for the various entries in the testator's books and inventories, purporting to show the expenditure by him of \$50,000 for the house which he gave Mrs. Corning, then the mere existence of the entries which charge the sum of \$50,000 as due from Mrs. Corning to the testator would not justify the inclusion of that amount among the assets of the estate, or its charge to Mrs. Corning as a part of her distributive share. But there is nothing in the decisions relied on by the contestants which seems to me to require that, as a necessary preliminary to charging Mrs. Corning with said \$50,000, it must be shown that the expenditure of that sum for her benefit was not a mere gift or advance, but was a transaction that made her in strict legal sense her father's debtor. If he chose for his testamentary purposes to regard that transaction as creating an indebtedness, and if he indicated his purpose in that regard by charging that amount as such, then a case has arisen in which, for aught that has been decided to the contrary, that sum may be held justly deductible from Mrs. Corning's share in this estate. I feel free, therefore, to decide, unhampered by anything

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MATTER OF ROBERT.

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that has been determined in *Robert v. Corning*, the question whether this testator has or has not stamped upon the word "indebtedness" a special and peculiar import.

At this stage of the discussion, I may conveniently refer to the case of *Rogers v. Daniell* (8 *Allen*, 343), which is cited by the contestants as lending efficient support to their claim, that in testamentary papers the term "indebtedness" should receive its strict technical interpretation. The testator, whose will was there under review, had bequeathed a sum of money in trust for his children, and had directed that any "legal debt due" from them respectively at his decease should be deducted from their several shares. He had at various times lent money to married daughters, and when he died he held promissory notes that they had given him in token of their obligations. It was held that, under the law of Massachusetts, these notes were without validity because of the coverture of their makers.

In answer to the contention that, for the purposes of the will, they should nevertheless be regarded as "legal debts," the court said: "The whole question seems to be whether, by a latitudinarian construction of the phrase, 'legal debt,' the court cannot say that these notes are embraced within its terms. In support of this view, the argument is pressed upon us that the surrounding circumstances all tend to show that such must have been the intention of the testator; that no other legal debts of his children are known to exist to which these words could refer. It is said that the intention of the testator is to govern.

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MATTER OF ROBERT.

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That is true ; but such intention is to be found in the words of the will, where the same is clearly stated. The phrase, legal debt, must certainly mean a debt which can be enforced in a court of law. These promissory notes signed by the plaintiff could not be enforced in a court of law against her, nor are they contracts for which she would be liable in a court of equity. It would have been very easy for the testator to refer to those notes and direct that they should be deducted from the portion given to the plaintiff. But as he has not done so, and has used language which does not include them as subjects of deduction, we must give to the words of the will their plain and natural meaning."

Between the facts of the case just cited, and the facts with which we are here dealing, there are obvious and important distinctions. One of them is this, that the word "debt" is in *Rogers v. Daniell*, but not in the case at bar, expressly taken out of the region of doubtful interpretation by the restrictive word "legal" ; and this is also to be specially noted, that in the Massachusetts case the testator gave no intimation in his will, either by reference to extraneous papers or otherwise, that he had used the phrase "legal debt" in any other than its customary technical meaning. Here, on the other hand, there is, in the testator's will, such mention of books and papers as to make them a constituent part of that instrument, and to necessitate, therefore, a reference to their contents for ascertaining the full measure of his testamentary purposes.

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MATTER OF ROBERT.

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Let us now proceed to examine in the journals, ledgers and inventories of Mr. Robert, the various entries made by him or under his direction touching the aforesaid items of \$50,000 and \$20,000.

The evidence shows that, for many years prior to his death, he was accustomed to keep formal books of account, upon which was spread, with very great particularity, the record of the business transactions of his life. It shows also that, for at least thirteen years before the execution of his will in 1878, he annually prepared a paper, styled by him an "inventory," which contained a detailed statement of the nature and value of his possessions. The inventory for the year 1877, which is the last of the series, includes under the heading of "ledger accounts" these two items, among others: "Frederick Robert, \$20,000; Jane R. Corning, \$50,000." These items form a part of an aggregate sum designated as "total assets," from which is subsequently deducted the gross amount of "liabilities," leaving a remainder designated as "net assets." From this last named balance is then deducted the sum total of certain items of so-called "unavailable property." Among those items are the two of \$50,000 and \$20,000, above specified. Both these items appear also on the testator's ledger. Frederick Robert is debited under date of January 1st, 1876, with \$20,000. This purports to be a balance of several items of debit and credit, whereof the first is dated February 22nd, 1864, and is a debit of precisely \$20,000. In the testator's day book, under the last named date, is the entry following:



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MATTER OF ROBERT.

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“Advanced to Frederick Robert on account of his portion of my estate, in order to enable him to go into business, which is to be charged him on settlement of my estate, but no interest, \$20,000.”

These entries in the day book and ledger are associated with each other by cross references to the respective pages whereon they appear.

In the same day book, under date of May 5th, 1864, appears the entry following:

“Having, on the 19th day of May last, by agreement of that date, bought of John H. Sherwood, two houses and lots, Nos. 8 and 10 East Fortieth street, and two stables and lots, Nos. 7 and 9 East Thirty-ninth street, at the price of \$140,000, intending the house No. 10 East Fortieth street and the stable No. 9 East Thirty-ninth street for my own occupancy, I have this day paid him on account thereof \$50,000. The house and lot No. 8 East Fortieth street I have bought for my daughter Jane R. Corning, and I propose eventually to give her the stable and lot No. 7 East Thirty-ninth street, but for the present I take title in my own name.”

On the same page of the day book, and under date of May 6th, 1864, is the entry following:

“Paid John H. Sherwood for the house and lot No. 8 East Fortieth street, which I have given to my daughter, Mrs. Jane R. Corning, by deed from the said Sherwood, as her separate property and as a part of her share in my estate, \$50,000. *I charge the amount to her*, but though counted as a part of my assets, no interest is to be charged thereon.”

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MATTER OF ROBERT.

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In the ledger of corresponding date, is this item in the account of Mrs. Jane R. Corning: "1864, May 6, to cash, \$50,000."

There are cross references between the day book entries and the entry in the ledger. These are the same amounts which were carried along from year to year in the books of the testator, and are referred to in every one of his annual inventories. Those inventories, with but a single exception, bear the signature of the testator. As regards both the character and arrangement of their contents, they are all substantially alike; but there appear in some of them certain features of special significance as regards the present inquiry. In all of them the items here in question are reckoned by the testator as constituting part of the "assets" of his estate. In some of them these items are deducted from the so-called "total assets" as "unproductive," and the balance after that deduction is sometimes styled "net assets," and sometimes "available assets" or "available property." The inventories of 1871, 1874 and 1875 have certain noteworthy features which distinguish them from all the rest. The two items here in dispute appear in customary fashion under the title of "ledger accounts," and, as usual, swell the amount of the "total assets." They are then, with other considerable items, deducted as "unavailable"; but the sum remaining, which is called "available assets," is in each instance subsequently increased by the addition of these very items of \$50,000 and \$20,000. I quote from the inventory of 1871:

## MATTER OF ROBERT.

Available assets.....	\$582,568 33	
Less separate property of Mrs. Robert.....	70,000 00	
	<u>          </u>	\$512,568 33
Add amount due from J. R. Corning.....	49,379 28	
(This is practically the \$50,000.)		
Frederick Robert.....	20,000 00	
Howell W. Robert.....	8,000 00	
	<u>          </u>	77,379 28
Amount for distribution, exclusive of Brookhaven property, lands on Mis- sionary Ridge and Lookout Mountain, real and personal estate.....		\$589,947 61

In the inventories of 1872 and 1873, there is no similar reference to the items "charged" to Frederick and Mrs. Corning as "due," and there is no inclusion of the amount covered by those items as a portion of testator's estate for the purposes of distribution; but the items reappear in the inventory of 1874. To the "available assets" of that year are added "Amount due from F. Robert, \$20,000; amount due from J. R. Corning, \$50,000."

These sums are included in the grand total, which is declared by the testator to be "the amount for distribution as near as I can tell." They appear also in the inventory of 1875, as the "amounts due" from Frederick Robert and Mrs. Corning respectively, and form a part of the "amount for distribution as near as I can now judge."

It is upon this state of facts that the question arises, whether, within the meaning of the testator's

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MATTER OF ROBERT.

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will, the advances of \$20,000 and \$50,000 must be regarded as "moneys or indebtedness," which, during the testator's lifetime, were "charged as due" from his children, Frederick and Jane, and which continued to be "outstanding or unsettled accounts" at the time of his decease.

It can scarcely be disputed that if, upon the face of his will, the testator had said: "By my use of the word *indebtedness* in this instrument I design to include all moneys heretofore paid to or for any of my children by way of loan, or by way of gift, or otherwise, in case such moneys shall be found charged as due against the respective names of my said children in my books of account," etc., it would be my duty to interpret that will in the light of his own definition of "indebtedness." Has not the testator substantially said that very thing in the will before me? Unless other considerations, which will presently be discussed, shall warrant a different conclusion, I shall feel bound to hold that the items here in dispute, are "items of indebtedness charged as due" within the meaning of that term in the will, and that they formed part of "outstanding and unsettled accounts" at the testator's death.

Such a conclusion would find no little support in a fact proved before the Surrogate after the submission of the referee's findings. About two years prior to the execution of his last will, this decedent executed a testamentary paper containing provisions very similar to those which appear in the later instrument, both as regards the fractional partitionment of interest among the residuary legatees under article four,

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MATTER OF ROBERT.

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and as regards also the provisions for adjusting charges of indebtedness under article six. That will seems to have been prepared by the testator himself, and it is fair to presume that the inventory of 1875 was then fresh in his recollection—an inventory in which he had included the items of \$50,000 and \$20,000 as a part of his assets for distribution, and in which he expressly characterized them as amounts due from his daughter Jane and his son Frederick.

Now, is there anything in the language of such provisions of the will as have not yet been considered, or in the results which flow from putting upon the sixth article of the will the interpretation to which I have thus far given countenance, that should lead me to reject that interpretation and adopt the conclusions of the referee?

It is manifest, upon reviewing the proceedings before that officer, that he was greatly impressed by the claim of the objectors, that, if the scheme of distribution favored by the executor should be adopted, it would produce glaring inequalities in the distribution of the estate. Whether it would or would not accomplish that result is by no means apparent. The inaccuracy of the aphorism, that figures won't lie, finds conspicuous illustration in the ingenious tabular statements that counsel have submitted for my guidance.

By one of these schemes of computation it seems to be established that, if the referee's report shall be sustained, if the \$50,000 and \$20,000 shall be left out of account by the executors in their administration of article six, and if the children and Robert College shall be paid in full the fractional portions

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MATTER OF ROBERT.

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respectively bequeathed to them by article four, they will all be put on a substantial equality. It is shown by this process that the total share of Christopher will thus amount to \$113,000, that of Frederick to \$112,000, that of Mrs. Corning to \$112,000, that of Howell to \$109,000, and that of Robert College to \$100,000.

According to the computation of counsel for Robert College, the practical result of the mode of distribution sanctioned by the referee would, on the other hand, be as follows: The sums yet to be paid, plus advances, and the interest and profits that have accrued therefrom, would, in the case of Christopher, amount to \$103,000, in that of Howell to \$111,000, in that of Frederick to \$112,000, in that of Robert College to \$84,000, and in that of Mrs. Corning to \$183,000.

Each of these modes of reckoning is plausible enough, and each is vigorously supported by considerations that I shall not stop to discuss.

The sole argumentative force of that which is urged upon my attention in behalf of Mrs. Corning and Frederick Robert is dependent upon the theory that the elaborate accounts kept by the testator of his financial dealings with his children and with Robert College, and the testamentary direction for the division of his estate into fiftieths, and for payment of the specified fractional portions to those legatees, evince an intention on his part to effect equality of distribution.

It is by no means clear to me that this was the testator's purpose, and it is by no means clear

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MATTER OF ROBERT.

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that, if it was his purpose, he might not have verily supposed he was effecting it by charging to Mrs. Corning and to Frederick Robert the advances that have occasioned this controversy. He may, for example, have taken into consideration, in assigning to Mrs. Corning a fractional interest so much smaller than that of the other legatees of his residuary estate, the large sums which, in the progress of years, had been realized by the investment of the \$50,000 for her benefit. And even the fact that, at the date of the will, the condition of his estate was such that a gift of five fiftieths, when reduced by a deduction of amounts "charged as due," would practically be no gift at all, might not have deterred him from assigning to Mrs. Corning that illusory and unsubstantial interest in his posthumous estate. If it seemed to him that the scheme of division into fiftieths would on the whole work out the result that he sought to accomplish, I think it was quite in accordance with his phenomenally methodical character as disclosed by the evidence, and with that confidence in his unerring wisdom that he so naïvely displays in his so-called autobiography, to accept and adopt it, however unjust or illogical it might appear to other minds.

I have discussed at such length the questions that seem to me of paramount importance in this disputed accounting, that I shall make no allusion to the less important phases of the contention, except to say that I have given them careful consideration, and am convinced that the exceptions to the referee's report must be sustained, and the account of the executor passed as presented.

Let a decree be entered accordingly.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—Oct., 1885; Feb., 1886.

CAMP v. FRASER.

*In the matter of the estate of JOHN H. FRASER, deceased.*

There is a grave doubt as to the right of appraisers of the property of a decedent to interfere with the assets of a partnership of which he was a member, or to demand the production or exhibition thereof, for the purpose of including a statement of the decedent's interest, in the inventory required by statute.

The surviving partners of a decedent, having a right to settle up the business of the firm, cannot be required to turn over the decedent's interest therein to his personal representative, until after payment of the partnership debts, and an accounting whereby the amount of such interest is determined.

A decree made, in a discovery proceeding, pursuant to Code Civ. Pro., § 2712, "requiring the person cited to deliver possession of . . . property to the petitioner," must particularly describe and indentify the property in question; and it is not too late to take advantage of a defect in this regard, upon a motion to punish the respondent for contempt in disobeying its mandate.

A person attending before a referee to make a deposition, under Code Civ. Pro., § 885, to be used in a special proceeding in a Surrogate's court, cannot be cross-examined by counsel for a party opposed to those at whose instance the examination has been ordered, even where, by direction of the court, he has received notice of the time when such examination would be had.

Reynolds v. Parkes, 2 Dem., 399—compared.

ORDER, granted at the instance of Hugh N. Camp, temporary administrator of decedent's estate, requiring Edwin and Charles Fraser, sons and surviving partners of decedent, to show cause why they should not be punished for a contempt in resisting and preventing the appraisement of the personal property belonging to that estate.



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CAMP V. FRASER.

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GEORGE W. BLUNT, *for temporary administrator.*

WILLIAM H. MEEKS, *for respondents.*

THE SURROGATE.—Under the circumstances disclosed in the papers before me, these respondents should not, I think, be regarded as in contempt for refusing to allow the appraisers to enter the premises which they and the decedent, in his lifetime, appear to have owned as tenants in common, and wherein they, in conjunction with the decedent, formerly carried on business as partners.

The stay of proceedings granted by Mr. Justice DONOHUE would have been a justification for such refusal while that stay was in force; and although it had been vacated at the time the alleged contempt was committed, it does not appear that the respondents were then advised of that fact. Indeed, if the property which was sought to be appraised was, as it seems to have been, assets of the partnership of which, in decedent's lifetime, he and these respondents were members, there is grave doubt as to the right of the appraisers to interfere therewith, or to require the production or exhibition of such assets, for including the same in the inventory. The right of possession of partnership property, and of disposition thereof for winding up the partnership affairs devolved, at decedent's death, upon the respondents, as his surviving partners.

It is not likely that the interests of his estate in the firm can be ascertained without an accounting or settlement of the partnership affairs (*Thomson v. Thomson*, 1 *Bradf.*, 35; *Waring v. Waring*, 1 *Redf.*, 207).

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CAMP V. FRASER.

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SUBSEQUENTLY, the temporary administrator made an application to punish Edwin Fraser for a contempt in disobeying an order, entered in a discovery proceeding instituted by the applicant under Code Civ. Pro., § 2706, directing Henrietta Fraser, and Edwin Fraser, her agent, to deliver a certain bank book to the temporary administrator or his attorney, "and pay over all moneys now in the hands of said Henrietta Fraser or Edwin Fraser, collected by them for the rent of the premises No. 13 St. Luke's place, in the city of New York ; also any and all moneys which belong to the estate of said deceased, which they may have received, for rents or otherwise."

THE SURROGATE.—The order, for disobeying which it is sought to punish this respondent for contempt, was improvidently entered.

Upon examination of the evidence in the discovery proceeding, it appears that, in the lifetime of the decedent, he and his sons Charles and Edwin were partners, and engaged in business as such at No. 112 Reade street, in this city. Those premises were owned by the firm, and were in part leased to tenants who are still in occupation. Since the decedent died, the share of his estate, in the rents derived from those premises, has been about \$33 a month, less certain deductions for repairs. Apart from these rents, it does not appear that any assets of the estate have come to the hands of this respondent. He and his brother Charles, as surviving partners of decedent, have a right to settle up the business of the firm, and cannot be required to turn over the interest of the

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CAMP V. FRASER.

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decendent therein to the representative of his estate until after payment of debts, and upon an accounting by which it shall be made apparent what that interest is.

It may be that the respondent is not, in this proceeding, in a position to raise these objections that might have been urged to the entry of the order of September 21st; but if such be the case, he is certainly not too late to object, as he does, that that order is defective because of its failure to specify and particularize the property which it directs to be transferred to the temporary administrator. In view of this defect, I ought not to attempt its enforcement by the summary and severe measures whose adoption is urged by counsel for the temporary administrator.

The affidavits submitted on the part of the respondent, and the evidence elicited in the discovery proceeding, tend to show that the rents of the St. Luke's Place property, deposited in the Irving savings bank, and the bank book containing the evidences of such deposit, have been in the possession and under the control, not of this respondent, but of his sister. These rents are the only property or funds, mentioned in the order under consideration, which are referred to therein with any approach to definiteness, and even as to these there is no specification of amounts.

I do not feel warranted, therefore, in adjudging the respondent guilty of contempt (*Guion v. Underhill*, 1 *Dem.*, 302).

UPON the judicial settlement of the temporary administrator's account, Edwin Fraser, who had been

appointed one of the administrators with the will of decedent annexed, and who, as such, had filed objections to that account, having obtained an order for the examination, before a referee, of Alfred W. Fraser, lately a contestant of the will, as a preliminary to the hearing of the objections, the Surrogate directed that notice of the time of the examination be given to the temporary administrator's counsel; who, attending thereat asked and was denied leave to cross-examine the witness. Thereafter, application for an order permitting such cross-examination was made before the Surrogate, who filed the following opinion, February 1st, 1886:

GEO. W. BLUNT, *for Hugh N. Camp, temporary administrator.*

WM. H. MEEKS, and JOHN A. FOSTER, *for administrators with will annexed.*

THE SURROGATE.—I think that the referee was right in refusing to allow Alfred W. Fraser to be cross-examined. The fact that, by my direction, and with consent of the counsel at whose instance the examination was ordered, notice was given to Mr. Blunt, of the time when that examination would be had, did not authorize Mr. Blunt to take part in the proceedings before the referee. It simply gave him an opportunity of hearing Fraser's testimony, and of taking such steps to contradict or explain it as might seem to him advisable.

Apart from the direction to which I have referred, there are no features of this case by which it can be distinguished from *Reynolds v. Parkes* (2 *Dem.*, 399). Fraser's examination was ordered by virtue of § 885

MATTER OF KRAUS.

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of the Code of Civil Procedure, and objections to the contents of his deposition, or to the mode of procuring it, will be seasonably made, if interposed when such deposition shall be sought to be used (*McCue v. Tribune Association*, 1 *Hun*, 469).

Motion denied.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—November, 1885.

MATTER OF KRAUS.

*In the matter of the application for revocation of the letters issued to EMANUEL KRAUS, as administrator of the estate of JULIA KRAUS, deceased.*

A Surrogate's court is without power to direct a referee, to whom a proceeding has by it been submitted, to file his report in advance of receiving his fees; or to require any party to pay those fees in advance of such filing. But a party making such payment may, in a proper case, be subsequently reimbursed, out of the estate or fund, or by an adjudication fixing a personal liability for the amount upon a party from whom the same may be justly demanded.

PETITION by James B. McKewan, alleging that a proceeding instituted to procure a decree revoking the administrator's letters had been referred at the instance of counsel for the administrator and others, and against petitioner's protest; that the referee's report was ready to be filed on payment of \$253.75 fees; that petitioner was too poor to take up the

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MATTER OF KRAUS.

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same; that the estate was exclusively personal, and did not exceed \$2,000; that the administrator had \$500 cash in hand, but refused to take up the report; and praying that the court direct the filing of the report, and make some provision for payment of the fees of the referee.

SACKETT, LANG, REED & MCKEWAN, *for petitioner.*

LEWIS HESSBERG, *for administrator.*

MAX ALTMAYER, *for distributees.*

THE SURROGATE.—The issues raised by a petition for the revocation of the letters of the administrator of this estate, and the answer thereto, were, on the 20th day of February last, sent to a referee, to take testimony in the premises and report the same with his opinion. The reference has been concluded, and the referee has prepared his report and opinion, but has not filed the same or delivered them to any of the parties. The petitioner now applies for an order which shall direct the filing of the report and the payment of the fees of the referee out of the assets of the estate.

In my judgment, the Surrogate is powerless to direct the referee to file his report in advance of receiving his fees, and powerless to direct that any one of the parties to the proceeding shall pay the referee before his report is filed (*Geib v. Topping*, 83 *N. Y.*, 46; *Perkins v. Taylor*, 19 *Abb. Pr.*, 146). If the referee shall see fit to file his report without exacting his fees, provision can be made, in the final decree or order that may hereafter be entered in this proceeding for the payment of those fees by such of the

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DICKERSON V. STOKES.

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parties hereto as may be found justly chargeable therefor.

And if any one of the parties shall pay the referee, and it shall, at the termination of the proceeding, appear that such party ought not, under all the circumstances, to be charged with the expenses of the reference, a direction may be given for his reimbursement, and for payment of costs of reference, either out of the assets of the estate, or by some one of the parties hereto as may seem just and proper.

Motion denied.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—November, 1885.

DICKERSON v. STOKES.

*In the matter of the estate of JAMES STOKES, deceased.*

Where a legatee is indebted to the estate of his testator, in a sum less than the amount of the bequest, the executor is bound to apply such portion of the latter as is needed to the satisfaction of the debt. It being permissible that this should be done at once, the testator must be presumed to have designed that the application should be made, as of the date of his death, so far as necessary to the debt's extinguishment, and the balance be treated as the real, substantial legacy, payable at the expiration of one year thereafter.

Testator, who died August 1st, 1881, left a will bequeathing \$10,000 to his nephew, D., who, on January 23rd, 1875, had given to the former his promissory note for \$5,000, with interest annually, and upon which interest was subsequently paid, up to January 23rd, 1881. A codicil to the will directed that there be deducted from the bequest to D., who had died, *the amount due testator from him and his estate*, and that the balance be distributed among his children. A question having arisen as to the proper method of computing interest upon the note, in making the deduction required,—

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DICKERSON V. STOKES.

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*Held*, that the amount payable on the legacy, August 1st, 1882, should be ascertained by deducting, from \$10,000, the principal of the note, plus interest thereon to the day of testator's death.

APPLICATION by James S. Dickerson and others, for a decree directing payment to them, by Anson P. Stokes, temporary administrator of the estate of decedent, of a legacy bequeathed to them in a codicil to the will of the latter. The facts appear sufficiently in the opinion.

GRAY & DAVENPORT, *for petitioners.*

BUTLER, STILLMAN & HUBBARD, *for administrator.*

THE SURROGATE.—On January 23rd, 1875, James S. Dickerson gave this testator his promissory note for the payment of \$5,000, with interest annually. Up to January 23rd, 1881, such interest was subsequently paid. It has been paid for no period since. On August 1st, 1881, the testator died, leaving a will which contained the following provision :

“I give and bequeath to my nephew, James S. Dickerson, ten thousand dollars.”

The will was silent respecting Mr. Dickerson's indebtedness; but in the absence of evidence that, by the gift of the legacy, the testator intended to remit the debt due from the legatee, it would, doubtless, have been the duty of the executors to withhold the amount of such debt from the amount of the legacy (*Smith v. Murray*, 1 *Dem.*, 34, and cases cited).

The testator, by one of the codicils to his will, modified the provision already quoted, as follows :—  
“There shall be deducted from the bequest to James S. Dickerson, since deceased, the amount due me from



## DICKERSON V. STOKES.

him and his estate, and the balance of said bequest remaining after said deduction, shall be distributed in equal shares among his children."

Upon this state of facts, the following question arises: Should the interest of Mr. Dickerson's children, on August 1st, 1882 (the date when their legacy became payable) be ascertained—

(a.) By deducting from \$10,000 the amount of the principal of their father's note, (\$5,000), plus one year's interest thereon to January 23rd, 1882 (\$300), plus interest on \$5,300 to August 1st, 1882 (\$167.10); or—

(b.) By deducting from the \$10,000 the principal of the note, (\$5,000), plus interest thereon to August 1st, 1881 (\$157)?

By one mode of calculation, the amount payable August 1st, 1882, on the legacy in question, is found to be \$4,532.90; by the other it is \$4,843. Mr. Dickerson's children are charged, in one event, with \$467.10, as interest on the debt, before interest began to run on the legacy, while, in the other, their liability for interest is deemed to have ceased at the death of the testator.

Even in the absence of the codicillary provision above quoted, I should be disposed to approve that method of computation for which the petitioners contend. Where a legatee is indebted to the estate of his testator in a sum less than the amount of the legacy, the executor is bound to apply such portion of the legacy as is needed to satisfy the debt. This he is at liberty to do at once. If, in the present case, the testator had given his nephew a money legacy

precisely equal to the amount due from the nephew at the testator's death, it would scarcely have been contended that, after the lapse of a year, the executor would have been entitled to claim a year's interest on the amount of the debt, upon the ground that no interest had as yet accrued on the legacy. It would rather have been presumed, that, despite the fact that payment of the legacy could not have been enforced until a year had passed, the testator had intended the legacy to operate at once as a full satisfaction and extinguishment of the debt. By parity of reasoning, should it not be presumed, when the legacy is greater than the debt, that the testator designed that the legacy should be at once applied, so far as necessary, to the debt's extinguishment, and that the balance should be treated as the real, substantial legacy, payable one year thereafter to the beneficiary? I have sought in vain for any reported case, in which this question has been squarely decided, but the scheme of computation the more advantageous to these petitioners seems to have been adopted in *Courtenay v. Williams* (3 *Hare*, 551); *Smith v. Smith* (3 *Giff.*, 263); *Snyder v. Warbasse* (11 *N. J. Eq.*, 463); and *Cannon v. Apperson* (14 *B. J. Lea [Tenn.]*, 553).

I think that, in the case at bar, this scheme derives a special sanction from the language employed by the testator in the codicil. That codicil speaks from his death. "There shall be deducted," he says, "from the bequest," etc., *the amount due me from him and his estate.*" This means, I take it, the amount due James Stokes on the day of his death.

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GAFFNEY V. PUBLIC ADMINISTRATOR.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—November, 1885.

GAFFNEY v. PUBLIC ADMINISTRATOR.

*In the matter of the estate of MARY SMITH, deceased.*

One S. died intestate, leaving, him surviving, his wife, the decedent, M., who was appointed administratrix of his estate, and died; whereupon petitioners were appointed administrators of her estate, while letters, *de bonis non* of S., were granted to the public administrator. During the lifetime of S. and M., deposits had been made in various savings banks, represented by six pass-books, standing in different names, and which, after the death of M., had come into the possession of one R., who delivered them to the public administrator. A special proceeding having been instituted by petitioners, under Code Civ. Pro., § 2706, to obtain possession of these books, there was no evidence as to the sources from which the moneys in question were derived.—*Held*,

1. That the claims to the deposits must be determined by the names appearing on the books; and, accordingly,
2. That two, originally in the name of S., and after his death, transferred to the name of "M., administratrix," should remain *in statu quo*.
3. That one, in the name of "S. for M." should be delivered to petitioners, the bank being responsible to them for the balance due to their intestate, at her death.
4. That one, in the names of "S. and M.," should be in like manner surrendered, the right of action, on the death of the former, vesting in the latter.
5. That the petition must be denied as to the remaining two, of which one stood in the name of "S. or M., either to draw," and the other in the name, "S. or M.,"—there being no reason, as regards these books, "to suspect that money or other property of the decedent" was "withheld or concealed by the person cited" (Code Civ. Pro., § 2712).

PETITION by Rosanna Gaffney and another, administratrix and administrator of decedent's estate, for examination of public administrator, under Code Civ. Pro., § 2706, as to property withheld, etc. The facts are stated in the opinion.

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GAFFNEY V. PUBLIC ADMINISTRATOR.

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R. OAKLEY, *for petitioners.*

L. H. ARNOLD, *for public administrator.*

THE SURROGATE.—One Michael A. Smith died in January, 1883, leaving this decedent, his widow, him surviving. She obtained letters of administration on her husband's estate in May, 1883, and continued to hold such letters until July 25th, 1885, when she died.

On the 7th of August last, the petitioners in the present proceeding were appointed administrators of her estate. On the 9th of October, two months later, the public administrator was appointed administrator, *d. b. n.*, of the estate of Michael.

While Michael and Mary were both alive, deposits were, from time to time, made in certain savings institutions, and in all these deposits both husband and wife seem to have had an interest. The pass books of these various banks, nine in number, were in the possession and control of the decedent, and at her place of residence on the day of her death. It is alleged by the petitioners, and is not denied, that these books were subsequently taken into the custody of Rosanna Ryan; that three of them, all standing in the name of the decedent, she surrendered to these petitioners, and that she caused the remaining six to be delivered to the public administrator, who now has them in his charge.

The petitioners seek by this proceeding, instituted under tit. 4 of ch. 18 of the Code of Civil Procedure, to obtain possession of these six bank books, and of three in particular, which they describe as "standing in the joint names of Michael and Mary Smith." As to the

sources from which the moneys here in question were derived, there is no evidence whatever. The character of the accounts and the respective claims of persons interested in the deposits must, therefore, be determined, for the purposes of this proceeding, by the names that appear upon the books themselves. They may be divided into five classes:—

1. Two of them stood originally in the name of "Michael A. Smith," and since his death have stood in the name of "Michael A. Smith, Mary Smith, administratrix."

The four others are in the names following:—

2. "Michael Smith for Mary Smith."
3. "Michael and Mary Smith."
4. "Michael A. and Mary Smith, either to draw."
5. "Michael A. Smith or wife, Mary."

Class 1. The two books in this class should remain in the hands of the administrator, *de bonis non*. Where A., the administrator of a decedent, B., dies, leaving assets of B. unadministered, such assets go to B.'s administrator, *de bonis non*, and not to the representative of B.'s original administrator (*Donaldson v. Raborg*, 26 *Md.*, 312); and this is the case even though such original administrator was entitled to share in the assets of his decedent's estate (*Taylor v. Brooks*, 4 *Dev. & Bat., Law*, 139).

Class 2. This book should be delivered to the petitioners. It was the property of their intestate personally, and the bank is now responsible to her representatives for whatever balance may have been due her at her death (*Lawrence v. Fox*, 20 *N. Y.*, 268).

Class 3. This book also should be surrendered to

the petitioners. Michael and Mary were joint depositors, and upon the death of the former, the right of action against the bank vested in the survivor. She was entitled, in her lifetime, and her representatives are now entitled, to hold the security and proceeds; and, to the extent of Michael Smith's interest in that account, his widow's representatives will hold them as trustees of all persons interested in his estate (*Blake v. Sanborn*, 8 *Gray*, 154; *Mulcahey v. Emigrant Industrial Savings Bank*, 89 *N. Y.*, 435).

Classes 4 and 5. The disposition of the book which stands in the name of "Michael A. and Mary Smith, either to draw," must also be governed by the decision of the Court of Appeals, in the case last cited. The bank seems to have agreed to pay to either depositor, on the production of the pass book. The present representative of Michael has the same right to draw upon the funds here in dispute as both he himself and his wife could have exercised while both were living; the same right that vested in the survivor after her husband's decease, and the same that the petitioners, as representatives of the survivor, are now possessed of.

In view of this apparent equality of ownership and of right of possession, I shall not direct the transfer of this book from the public administrator to the petitioners, nor should I if it were now in the hands of the petitioners, and if the public administrator sought to procure its surrender, grant the relief asked.

The decree which, in this class of cases, the Surrogate is empowered to make, by § 2712 of the Code, is only warranted when, as a result of examination,

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FERNBACHER V. FERNBACHER.

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“it appears that there is reason to suspect that money or other property of the decedent is withheld or concealed by the person cited.” It was declared by the Supreme court in this department, in *Matter of Curry* (25 *Hun*, 321), that “the Surrogate can only decree that possession be delivered to the representative of the deceased party where it clearly appears that such possession is wrongfully withheld.”

. . . . . “It was by no means the intention of the statute,” said DAVIS, P. J., “to go farther than to rescue the property clearly belonging to the estate of the decedent, from a party not lawfully entitled to withhold it.”

I must, therefore, deny this application, so far as it relates to the pass book which is in the name of “Michael A. and Mary Smith, either to draw,” and to the one which is in the name of “Michael A. Smith or wife, Mary.” I see no difference in principle between the two cases last considered.

Decreed accordingly.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—November, 1885 ; *again*, January, 1886.

FERNBACHER v. FERNBACHER.

*In the matter of the estate of WOLF FERNBACHER, deceased.*

Under ordinary circumstances, executors are not justified in turning over to one who has a simple life estate therein, property given in remainder to another, without exacting from the first taker security for the latter's protection.

## 228 CASES IN THE SURROGATES' COURTS.

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### FERNBACHER V. FERNBACHER.

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*Contra*, where the will indicates a design on the part of a testator, to entrust full possession and control to the life beneficiary, unless special circumstances render such an unconditional surrender manifestly hazardous.

Testator, by his will, whereof his wife and two other persons were nominated and appointed executors, gave to the former all his real and personal estate, "for her life, she to have the same power of sale and control over said property as I could have in my own proper person, during her said life estate;" gave to his children, in equal shares, in fee, all the rest, residue, etc., of his property "which shall remain after the life estate" mentioned; directed that his sons should carry on his business so long as the wife thought best; authorized the latter to pay, during her lifetime, to any of the children, all or any part of the shares to which they "may be entitled" under the previous provision in their favor; and bestowed upon his executors "full power to sell" any or all of the real or personal property, as to them should seem meet in order to carry out the terms of his will.—

*Held*, that the first clause of the will, whether considered alone or in the light of the remaining provisions, conveyed a simple life estate to the widow; who, accordingly, had no right or power, by consuming either a part or the whole of the principal, to impair or defeat the possibility of remainder to the children.

It was contended that the testator's widow obtained an absolute fee or interest, subject only to the taking effect of the remainder, in default of the exercise of the power of sale in her lifetime,—under the provisions of 1 R. S., 732, §§ 81, 85, providing for such a result "where an absolute power of disposition, *not accompanied by any trust*, shall be given to the owner of a particular estate," etc.—

*Held*, that, by reason of the limitation contained in the italicized clause, the statute cited had no application to the case at bar.

Upon a petition presented, under Code Civ. Pro., § 2685, subd. 2, by one of the remaindermen named in the same will, for the removal of the executrix and executors, upon the ground of their misconduct in having wasted, misappropriated and improvidently managed the estate, it appearing that respondents had intentionally omitted from their account items of assets with which they should have charged themselves; falsely stated the sum for which testator's business was sold, and neglected to realize the same; and, especially, that the executors, other than the widow, had surrendered to the latter, without security, possession of all the property, knowing her to entertain a design, which she in fact effectuated, to waste the fund at the expense of the remaindermen;—

*Held*, that the application should be granted, an immediate revocation of the letters being proper under the circumstances, in advance of the entry of a decree upon an accounting then in progress.

The operation of a decree revoking letters testamentary cannot be prevented, pending an appeal taken therefrom, by any undertaking given



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FERNBACHER V. FERNBACHER.

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upon such appeal. To make the appeal effectual for any purpose, an undertaking in the sum of \$250 must be filed as prescribed by Code Civ. Pro., § 2577.

CONSTRUCTION of the will of decedent, upon an application made by Isaac Fernbacher, his son and one of the remaindermen under that will, for revocation of the letters issued to Regina Fernbacher and others, as executrix and executors thereof, on the ground of their having wasted and improperly applied the money and other assets of the estate which came into their hands, and improvidently managed and injured the property committed to their charge. The facts appear sufficiently in the opinion.

JACOB MARKS, *for petitioner.*

LAUTERBACH & SPINGARN, *for respondents.*

THE SURROGATE.—The issues raised by the objections interposed to the accounts of Nathan Fernbacher, executor, and Regina Fernbacher, executrix of this estate, are now on trial before a referee appointed by the Surrogate. Pending such trial, the party at whose instance the accounting was ordered seeks the revocation of the testamentary letters heretofore issued to the accounting parties and to Samuel Abraham, their co-executor. The ground of this application is the alleged waste and misappropriation, by the executors, of the property and assets of the estate, and the improvident management of its affairs. The action of her associates, in turning over and suffering to be turned over to the executrix individually, and for her own use and enjoyment, the entire estate (after payment of certain legacies bequeathed by the

third and fourth clauses of the will, and after certain disbursements specified in the account), and the action of the executrix herself in converting such property to her own use, are the main grounds upon which the petitioner relies in this proceeding.

In determining whether those grounds will support the revocation of letters, it is necessary to construe certain provisions in the testator's will. Of the authority of the Surrogate in this regard, under such circumstances as the present, I have no doubt. The reasons that justify the exercise of such jurisdiction in proceedings for the judicial settlement of executors' accounts are equally applicable here. Those reasons are set forth in *Tappen v. M. E. Church* (3 *Dem.*, 187).

The testator's will contains the following provisions:

"1st. I give and bequeath to my wife, Regina Fernbacher, all my real and personal estate of whatsoever nature and wheresoever situate, for her life, she to have the same power of sale and control over said property as I could have in my own proper person, during her said life estate.

"2nd. I give and bequeath to my children or their heirs, share and share alike, all the rest, residue and remainder of my real or personal property in fee absolutely and forever which shall remain after the life estate given in the first provision of this my will to my wife, Regina Fernbacher.

"3rd. It is my will, and I give and bequeath to my daughter, Pauline Fernbacher, \$1,000 of the insurance which is now on my life, in addition to that por-

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FERNBACHER V. FERNBACHER.

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tion of my real and personal property which she shall be entitled to receive under the second provision of this my will.

“5th. It is my will, and I direct that my sons carry on the business in which I am now engaged, without change, so long as my wife, Regina Fernbacher, thinks best.

“6th. It is my will that my said wife, Regina Fernbacher, shall have power, and she is hereby authorized in her discretion to pay to all or any one of my children, at any time during her life, all or any part of the share or shares to which all or any one of my said children may be entitled in my real or personal estate under the second provision of this my last will and testament.

“7th. I appoint my wife, Regina Fernbacher, executrix, and Nathan Fernbacher and Samuel Abraham executors of this my last will and testament, with full power to sell, at public or private sale, at such times and upon such terms and in such manner as to them shall seem meet, in order that the terms of this my last will may be carried out, any and all of the real estate or personal property of which I shall die seized and possessed.”

Although the testator left him surviving several children, it is claimed by counsel for the respondents that, after payment of debts and expenses of administration, the testator's widow, by virtue of the first clause above quoted from the will, acquired the absolute title to all the property left by her husband, and to the proceeds of such portion thereof as had been or might thereafter be sold, either under the power

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given by clause first, or under that given by clause sixth; and the respondents' counsel insists that, if this contention is erroneous, and if the interest of the widow is to be considered as limited to a life estate, she nevertheless has at all times been authorized to exercise, for her own benefit, absolute "power and control" over the property of the estate, and, by consuming the same if she saw fit so to do, to defeat the possibility of remainder to the children.

Neither of these propositions commands my approval. The grant, in clause first, of "the same power of sale and control over said property," as the testator himself possessed, does not, when taken in connection with its immediate context, and with after provisions of the will, enlarge to a title absolute the interest which is expressly given Mrs. Fernbacher for life, nor does it authorize either complete or partial absorption by her of the principal of the estate.

In support of the claim of the absolute character of the widow's interest, and of the invalidity of the dispositions in behalf of the children, several cases have been cited by counsel. In these cases, the well known principle has been recognized that, where a testator has made an unqualified bequest or devise, and has thus evinced his intention that the beneficiary should have absolute property in the thing given, a subsequent limitation over is void, because repugnant to the original disposition. Such is the doctrine of *Helmer v. Shoemaker* (22 *Wend.*, 137); *Jackson v. Robins* (16 *Johns.*, 538); *Annin v. Vandoren* (14 *N. J. Eq.*, 135); *Downey v. Borden* (36 *N. J. Law*, 460); *Stuart v. Walker* (72 *Me.*, 145);

*Ide v. Ide* (5 *Mass.*, 500); *Patterson v. Ellis* (11 *Wend.*, 259); *Norris v. Beyea* (13 *N. Y.*, 273, 286; *Dutch Church v. Smock* (*Sexton Ch.*, *N. J.*, 148); *Jones v. Bacon* (68 *Me.*, 34); *Campbell v. Beaumont* (91 *N. Y.*, 464).

But I think it too plain for argument that, whatever may be the true construction of this will, the testator's widow has not acquired, by the clause now under discussion, such an absolute property in this estate as to invalidate the gift over. It is another question, however, whether she is limited to a bare life estate, with the right to demand and enjoy nothing more than the interest and income of a principal that is to go to others at her death, or whether her life estate is coupled with a power on her part to receive such principal in her lifetime, and appropriate it wholly or in part to her own use, so that only such portion of it as may not at her death have been disposed of will pass to the children under the second clause of the will.

*Wright v. Miller* (8 *N. Y.*, 9, 24), decided in 1853, was a case in which A. had conveyed to a trustee certain real estate with a power, during A.'s life, and with A.'s consent, to lease or sell the same, and, after making certain disbursements from the proceeds, to pay over the balance "for the reasonable support and maintenance of the grantor as she may require the same, and as to the residue thereof, if any there shall be, then upon trust," etc., etc. The Court of Appeals held that the limitation over for the benefit of A.'s children was valid, the power of disposition retained by A. being limited to so much of the proceeds of the

property as might be needed to defray the expenses of her reasonable support and maintenance during her life.

In 1872, the Supreme court of New Hampshire, in *Burleigh v. Clough* (52 *N. H.*, 267), held that, where a testator gave his wife all his estate, "to her use and disposal during her natural life," with a gift over of "what is remaining at her decease," the widow took an estate for life, together with a power practically to defeat the estate of the remainderman, but that the gift in remainder was nevertheless valid, as to anything that she might leave at her decease.

In 1875, our Supreme court in the Fourth department decided *Bell v. Warn* (4 *Hun*, 406). A testator had bequeathed \$1,250 to his daughter, providing that the same should be invested, and that the interest thereon should be paid to her during her life semiannually, and that if, from sickness or want, there was need to resort to the principal for her support, the executors should do so, even to the exhaustion of the entire fund. The will further provided for a gift over of any portion of the \$1,250 that might remain at the daughter's death. It was held that this gift over was good, though the life interest of the first taker was coupled with a power of disposing of the whole estate, if such disposition should be needed for her maintenance.

In *Terry v. Wiggins* (47 *N. Y.*, 512 [1872]), a testator gave the residue of his real and personal estate to his wife "for her own personal and independent use and maintenance, with full power to sell or otherwise dispose of the same, if she should require it or

deem it expedient so to do." He authorized his executors to invest whatever residue there might be at her decease, etc. By a previous clause in his will, the testator had devised to his widow certain real estate "for her sole and absolute use and disposal." The court held that the terms first above quoted were to be discriminated from those quoted later, and that the widow took only a life interest in the residue; the power of disposal not operating to enlarge her estate to absolute ownership, and simply enabling her to encroach upon the *corpus* of the estate, for whatever might be necessary for her personal use and maintenance.

The language of a will, construed in 1873 by our Court of Appeals, in Taggart v. Murray (53 *N. Y.*, 233), was as follows: "All my remaining property I give to my daughter, Cornelia, for her support and comfort, to be held and controlled by her, and at her death to pass to her heirs, or, if she leaves no heirs, to be disposed of by her in will to whom and for what purpose she may deem right and proper." Held, that the testator intended a gift of a life estate only, the power of disposition by will being superadded, limited, however, upon the event of the life tenant's leaving no heirs.

In 1876, the Court of Appeals, in Smith v. Van Ostrand (64 *N. Y.*, 278), held that a testator's bequest to his wife of a certain sum of money "for her support during her natural life," and his directions that, upon her death, the "said dower" should be transferred to his three children, when taken in connection with the following provision—" \$50 of the

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FERNBACHER V. FERNBACHER.

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above named sum shall be paid her as soon as possible after my decease, and the remainder on or about six months after"—must be construed as a gift of so much of the principal fund as might be necessary for his widow's support, and so much only; and that the gift of the remainder, subject to the exercise of the power, was valid and effectual.

Thomas v. Pardee (12 *Hun*, 151) was decided in 1877. There a testator gave his wife all his estate, "to be possessed and used by her at her discretion, and for her support and comfort during her natural life, having confidence in her that it will be used and retained, and the amount, the increase and the residue left sacred to the purposes," etc. This was followed by a gift over of what might be left by the widow at her decease. She was declared entitled to draw principal and interest, so far as the same might be necessary for her support, but the gift over was sustained.

Flanagan v. Flanagan (8 *Abb. N. C.*, 413) was determined in 1880. By the will there construed, a testator had given one third of the residue of his estate to his wife, "to be hers absolutely." He had also given her "the use of all the remainder during her life, and the portion left of such remainder to A. B.," etc. It was held that the words, "left of such remainder," implied a right, superadded to the rights of a life tenant, to make disposition of the principal, even to its complete exhaustion and the consequent defeat of the limitation over; but it was, nevertheless, held that such limitation was a valid disposition.



## FERNBACHER V. FERNBACHER.

From the cases above cited, the case at bar can be clearly distinguished. I find, in the language of the will before me, nothing that warrants the interpretation that the widow of this testator is entitled to any portion whatever of the principal estate wherein she is given a life interest. By the first clause of the will, on the contrary, whether it is considered by itself or in the light of the remaining clauses, it seems to me that a life interest, pure and simple, is intended to be conveyed.

In the well known case of *Bradley v. Westcott* (13 *Vesey*, 445), Sir WILLIAM GRANT, as Master of the Rolls, construed a will whereby a testator gave certain property to his wife "for and during the term of her natural life, to be at her full, free and absolute disposal and disposition during her natural life." The widow was also given a power of appointment. In default of its exercise, there was a gift over to certain designated persons. The court said: "As the testator has given to her" (his wife), "in express terms, an interest for life, I cannot, under the ambiguous words afterward thrown in, extend that interest to the absolute property. I must construe the subsequent words, with reference to the express interest for life previously given, that she is to have as full, free and absolute disposition *as a tenant for life can have.*"

In *Smith v. Bell* (6 *Peters*, 68), where a testator had given his personal estate to his wife "to and for her own use and benefit and disposal absolutely, the remainder of said estate, after her decease, to be for the use" of the testator's son, it was held that the

wife took a life estate only. MARSHALL, C. J., pronouncing the opinion of the court, said: "If the first bequest is to take effect according to the obvious import of the words taken alone, the last is expunged from the will. The operation of the whole clause will be precisely the same as if the last member of the sentence were stricken out; yet both clauses are equally the words of the testator, are equally binding, and equally claim the attention of those who may construe the will. We are no more at liberty to disregard the last member of the sentence than the first. The first part of the clause, which gives the personal estate to the wife, would, undoubtedly, if standing alone, give it to her absolutely. . . . The difficulty is produced by the subsequent words. They are: 'which personal assets I give and bequeath unto my said wife, to and for her own use and benefit and disposal absolutely.' The operation of these words, when standing alone, cannot be questioned. But suppose the testator had added the words, 'during her life.' These words would have restrained those which preceded them, and have limited the use and benefit, and the absolute disposal given by the prior words, to the use and benefit, and to a disposal for the life of the wife. . . . Even the words, 'disposal absolutely,' may have their absolute character qualified by restraining words connected therewith, and explaining them to mean such absolute disposal as a tenant for life may make."

Brant v. Virginia Coal Co. (3 *Otto*, 326) was a case in which a testator had bequeathed to his wife all his real and personal estate, "to have and to hold during

her life, and to do with as she sees proper before her death." FIELD, J., pronouncing the opinion of the court, said: "The interest conveyed was only a life estate. The language used admits of no other conclusion, and the accompanying words, 'to do with as she sees proper before her death,' only conferred power to deal with the property in such manner as she might choose, *consistently with that estate*." The learned Justice added that, "where a power of disposition accompanies a bequest or devise of the life estate, the power is limited to such disposition as a tenant for life can make, unless there are other words clearly indicating that a larger power was intended." In *Boyd v. Strahan* (36 *Ill.*, 355), a testator's bequest to his wife of all his personal property, "to be at her own disposal and for her own proper use and benefit during her natural life," was held to give her a life estate simply.

The following testamentary provision was under consideration in *Cory v. Cory* (37 *N. J. Eq.*, 198): "I give all my estate to my wife, for her sole use and benefit, for and during her natural life, to be under her control and used by her as she sees fit to use the same, and in case she should find it necessary, or see fit, to dispose of any part or all of the same, I empower her," etc. "After the death of my wife, I order my executors to sell all my estate remaining at her decease, and to dispose of the proceeds as follows," etc. Held, that the widow was entitled to a life estate only.

A similar construction was, in *Stuart v. Walker* (72 *Me.*, 145), put upon the words following: "All my

estate, real and personal, with the right to use, occupy, lease, exchange, sell, or otherwise dispose of the same according to her own will and pleasure, during her lifetime, and so much of the said estate as may remain unexpended and undisposed of by my wife at her decease, I give," etc.

It is claimed by counsel for the executors that, by R. S., part 2, ch. 1, tit. 2, §§ 81, 85 (3 Banks, 7th ed., 2189), this testator's widow obtained under the will an absolute fee or interest, subject only to the taking effect of the remainder given to the children, in the event that the power of sale should not be exercised in the widow's lifetime. But these sections, by their very terms, are only operative where there is an "absolute power of disposition not accompanied by any trust," and, in my judgment, have no application to the case at bar.

Upon the authorities above cited, I hold that it has never been possible for Mrs. Fernbacher, by the exercise of any power derived from her husband, to acquire any personal interest in the property left by him at his death, or in the proceeds of its sale, other than such as pertains to a life estate.

The conclusion thus warranted by decided cases, as to the meaning of the first clause of this disputed paper, is discovered, upon examination, to be in harmony with the clauses that follow. The second clause bequeaths to the children, "in fee absolutely and forever, the residue and remainder of the testator's real or" (*i. e.*, and) "personal property which shall remain after the life estate given in" clause first.

Here is a disposition of the remainder after a prece-

dent life estate; that is, of what is left after the life estate has been carved out of the fee. There is in these words no suggestion that the life beneficiary, by wielding the power of disposition, can appropriate the entire estate to her own benefit, and that the children are to enjoy only such part of the property as the widow may chance to leave at her death. Nor are the provisions in the third, fifth and sixth clauses in harmony with such interpretation. Those provisions, in connection with clause second, show that the testator intended to give to his wife a simple life interest, with power of converting the character of the property of the estate, and, at her death, to give his children the principal of such estate, whether it should then wear its original shape or should theretofore have assumed another.

It is unnecessary to cite authorities in support of that established canon of interpretation, that, in construing a will, the testator's intention must be sought from the instrument as a whole, and that its several provisions must be accorded such enlarging, restricting or qualifying effect, as seems most consistent with the purposes of its maker.

When this will is thus construed, there is scarcely room for doubt that the power of sale given to the widow, and that given subsequently to the executors, were intended to be exercised, not for the widow's benefit exclusively, but for the benefit of the remaindermen as well, who will be entitled, at their mother's death, to receive, without impairment or diminution, the principal estate of which she will have had the life enjoyment. In this sense, the power conferred

may justly be regarded as one of trust, with which §§ 81 and 85, above cited, are in no wise concerned (Coleman v. Beach, 97 *N. Y.*, 545; Thomas v. Pardee; Smith v. Van Ostrand; Flanagan v. Flanagan, *supra*).

Now, in view of the relation which the widow and children of this decedent sustained towards the estate, it was clearly the duty of the executors to collect as soon as practicable the personal property left by decedent, including, of course, the proceeds of any of the realty sold by them or coming to their hands. This duty they owed to the remaindermen, who were entitled to be informed of the true nature, condition and value of the assets, and to have such of them as were outstanding realized and recovered; and this entirely irrespectively of the question whether the executors were or were not authorized to turn over all the property of the estate to the life beneficiary, without security for its preservation for those entitled in remainder.

It appears that, in 1877, an account was filed with the Surrogate by Nathan Fernbacher and Samuel Abraham, as executors. Another was filed by Nathan Fernbacher and Regina Fernbacher in the pending accounting proceeding, before its issues were submitted to the referee. In the place of the latter, a third has since been submitted.

The latest account shows that, in that of 1877, the executors failed to include certain assets, of whose existence they must then have been advised. The statement, in schedule G. of the last account, of the transfer by the accounting parties, to the widow, of such part of the assets contained in schedule A. as

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FERNBACHER V. FERNBACHER.

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had not been applied to the payment of debts and expenses of administration, shows that such assets were so transferred with the knowledge that the widow was about to convert them to her own use, and with the object of affording her an opportunity of so doing. In the account of 1877, the business of the decedent was alleged to have been sold by the widow to her sons Nathan, Isaac and Philip for \$6,000. In the account recently submitted to the referee, that business is declared to have been sold for the sum of \$10,000, payable on demand. It is further alleged that "no demand of payment has ever been made, as the widow was directed by the testator, prior to his death, to give his business to his sons, should she see fit, and as she was authorized to do under his will."

No direction of the testator such as is thus described would have been effectual to confer the authority claimed, nor is any such authority conferred by the will. The conduct of the executors in omitting from the first account assets with which they should then have charged themselves, and which, as I think, they intentionally omitted, the subsequent conduct of these accounting parties in falsely representing the sum for which the testator's business was disposed of, in neglecting to realize or to make any effort for realizing the amount for which the account last filed declares the business to have been actually sold, and in surrendering the entire assets of the estate to the widow, furnish sufficient proof of the improvident management of the estate, and of misconduct on the part of the executors, to justify their removal from office.

It is urged by counsel for the respondents that, even if his contention respecting the extent of Mrs. Fernbacher's interest in the estate is erroneous, her co-executors were not at fault in surrendering the estate into her hands without requiring security for the remaindermen. The law upon this general subject does not seem to be well settled. In *Westcott v. Cady* (5 *Johns. Ch.*, 349), the Chancellor said: "Formerly the legatee entitled in remainder after an estate for life was allowed to call upon the legatee for life, not only for an inventory, but for security that the goods should be forthcoming at his decease. But the rule of practice has since been altered on that point." Some years later, in *Covenhoven v. Shuler* (2 *Paige*, 122, 132), the Chancellor said: "The modern practice in such cases" (that is in cases of bequest for life with limitation over of specific articles) "is to require an inventory of the articles, . . . and security is not required unless there is danger that the articles may be wasted or otherwise lost to the remainderman."

It would seem, from later decisions of the courts of this State, that, under ordinary circumstances, executors should not turn over property to one who has simply a life estate therein, when such property is given in remainder to another, without obtaining from the first taker security for the protection of the remainderman (*Tyson v. Blake*, 22 *N. Y.*, 558; *Montfort v. Montfort*, 24 *Hun*, 120; *Livingston v. Murray*, 68 *N. Y.*, 485).

Some of the clauses of this will, however, indicate that it was the testator's design to entrust to the life



beneficiary the full possession and control of this estate. Where there is an expression in a will of such an intention, its executors are warranted, unless there are special circumstances making such a course hazardous, in surrendering the principal of the estate to the care of the life tenant, without requiring security (*Fiske v. Cobb*, 6 *Gray*, 144; *Weeks v. Weeks*, 5 *N. H.*, 326; *Taggard v. Piper*, 118 *Mass.*, 315; *Flanagan v. Flanagan*, *supra*; *Smith v. Van Ostrand*, *supra*).

The ground upon which the severity of the old practice has been somewhat abated is doubtless this: that for the court to decree security in all cases would often defeat the purposes of the testator. But whenever it has appeared that property bequeathed for life with remainder over has been in danger of being wasted, secreted or removed, the courts have held that the interests in remainder were entitled to be protected by compelling the life tenant to give security (2 *Perry on Trusts*, 3rd ed., § 541).

The same regard to a testator's intentions which led the Chancery Court to abandon the practice of requiring security, as of course, upon the mere application of a remainderman whose interests were in no practical danger, demands the exaction of security where the testator's intentions are otherwise likely to be frustrated by the conduct of the tenant for life. Now, in this case there is the exceptional feature of the purpose on the part of the life beneficiary (a purpose well known to the other executors, and practically countenanced by them) of wasting the fund, and of destroying the interests of the remaindermen

therein, by converting and appropriating it to her individual use and benefit. Under these circumstances, it seems to me that the executors were grossly remiss in failing to obtain security for the safe transmission to the remaindermen of the principal of this estate. This failure I regard as evidence of misconduct and improvident management by the executors, and of unfitness for the due administration of their trusts.

It is the general practice to defer the determination of an application of this character, pending accounting proceedings, until such proceedings have terminated, but the undisputed facts, and the disclosures of the papers submitted herein, satisfy me that no injustice will be done to these executors by directing their immediate removal.

Let a decree be entered accordingly.

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The following opinion, in the same matter, was filed January 4th, 1886:

THE SURROGATE.—I consented to hear the parties to this proceeding, before the entry of a decree conformable to my decision of November 23rd, upon the question whether an appeal from that decree could be made effectual as a stay of proceedings for its enforcement; and if yea, then, in order to secure that result, what should be the penalty of the undertaking?

Upon careful examination of the various provisions of art. 4, tit. 2, ch. 18 of the Code of Civil Procedure, I am convinced that the operation of the decree removing the executors and trustees can not be prevented by appeal; and that to make an appeal *other-*

wise effectual, it is only necessary to give an undertaking, under § 2577, in the sum of \$250. Section 2584 provides that a perfected appeal shall operate as a stay, "*except as otherwise expressly prescribed in this article.*"

Now, it is, among other things, *expressly prescribed*, in § 2583, that an appeal from a decree suspending an executor, or removing or suspending a testamentary trustee, "*does not stay the execution of the decree or order appealed from.*"

Sections 2578 and 2579 make special provision for the exacting of extraordinary security in the cases in such sections referred to, and § 2580 indicates the mode of ascertaining the amount of the security to be exacted in *those* cases, and in those cases only. In the third paragraph of that section, which begins with the words, "In every other case it must be fixed by the Surrogate," the word *it* refers, not *generally* to "the sum specified in an undertaking," but *particularly* to "the sum specified in an undertaking executed as prescribed in either of the last two sections" (2578 and 2579).

- In the cases provided for in §§ 2578 and 2579, the appeal is perfected by giving the special security, and thereupon proceedings are stayed by the operation of § 2584. In the cases for which § 2583 makes provision, though the appeal is not effectual for any purpose until the \$250 undertaking has been given, there is no provision for exacting or accepting any *other* undertaking than that, and the giving of *that* does not effectuate a stay.

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MATTER OF COGSWELL.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—November, 1885.

MATTER OF COGSWELL.

*In the matter of the estate of WILLIAM L. COGSWELL,  
deceased.*

Legacies bequeathed to infants, "*to be paid* to them as they shall severally attain the age of twenty-one years," with gifts over in the event of earlier demise, vesting on testator's death, are not within the purview of an Act taxing legacies, prospective in its character, passed after such death, though before the legacies become payable.

THE will of decedent was admitted to probate May 1st, 1880. It bequeathed to each of two nephews \$15,000, to be paid as they severally attained the age of twenty-one years. Upon the death of either of them under that age, the legacy of the one so dying was given to one of the executors. One of the nephews, William, who had become of age, was paid the amount of his legacy in 1881, pursuant to a decree of the Surrogate's court, which directed the executors to retain \$15,000, to be paid to the other, John, upon his reaching majority; which happened October 30th, 1885. On June 10th, 1885, the legislature passed an act, entitled: "An act to tax gifts, legacies and collateral inheritances in certain cases;" and providing that, "After the passage of this act, all property which shall pass by will, or by the intestate laws of this State, from any person who may die seized or possessed of the same while being a resident of the State, or which property shall be within this State,"

## MATTER OF COGSWELL.

etc., etc., (with certain exceptions) "shall be, and is, subject to a tax of five dollars on every hundred dollars," etc.

The court was asked to determine whether this act applied to John's legacy.

R. S. HART, *for legatee.*

THE SURROGATE.—One of the clauses of the will of this testator is as follows: "I give to my nephews, William and John, the sum of \$15,000, to be paid to them by my executors as they shall severally attain the age of twenty-one years." Then follows a gift over, in the event of either of them being removed by death before attaining that age.

I think that, at the death of the testator, his nephews both took vested interests in their respective legacies, subject to become divested in the event of death before their arriving at the age of twenty-one (*Phipps v. Ackers*, 9 *Cl. & Fin.*, 583; *Bowman v. Long*, 23 *Ga.*, 247). Says Jarman, in his treatise on wills: "Although there is no doubt that a devise to a person, if he shall live to attain a particular age, would be contingent if standing alone, yet if it be followed by a limitation over in case he die under such age, the devise over is considered as explanatory of the sense in which the testator intended the devisee's interest in the property to depend on his attaining the specified age, namely, that at that age it should become absolute and indefeasable; the interest in question, therefore, is construed to vest *instanter*" (2 *Jarm. on Wills*, 5th Am. ed., 424).

As the interest of John D. R. Cogswell, under this

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LUSSEN V. TIMMERMAN.

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will, passed to him from the testator before taking effect of the act of June 10th, 1885, entitled, "An act to tax gifts, legacies and collateral inheritances in certain cases," I hold that that statute has no application to the case at bar.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—November, 1885.

LUSSEN v. TIMMERMAN.

*In the matter of the estate of GESCHE LUSSEN, deceased.*

Under 2 R. S., 74, § 28, declaring that, among kindred of an intestate of the same degree, males shall be preferred to females, in the grant of letters of administration upon the estate, a son who resides in another state has, in spite of that fact, a priority of right over a daughter resident here.

Where, pending an application, by one "legally competent to act," for original letters of administration of the estate of an intestate who resided in another state at the time of his death, a domiciliary administrator asks that ancillary letters be issued to him, the court, under Code Civ. Pro., § 2696, subd. 2, though it has power, is not compelled to grant the prayer of the former, but may, in its discretion, issue letters, either original or ancillary, to the foreign representative.

APPLICATIONS for letters of administration, original and ancillary, of the estate of decedent. The facts are stated in the opinion.

JESSE K. FURLONG, *for Henry Lussen.*

SIDNEY H. STUART, *for Celia Timmerman.*

THE SURROGATE.—On the 25th of July, last, this

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LUSSEN V. TIMMERMAN.

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decedent died intestate in Hudson county, N. J., leaving certain personal property in the county of New York, and leaving, as her next of kin, nine adult children, of whom seven are residents of New Jersey, and two reside in this city. One of those two children, Celia Timmerman, filed a petition in this court on September 23rd last, asking that she be appointed administratrix of the estate, and that her husband be joined with her in its administration. Upon this petition a citation was issued, addressed to Margaret E. Mundeking, the petitioner's sister, resident in New York. A citation was returned on October 2nd, 1885, and the proceedings were then adjourned until October 16th, on which day Henry Lussen, a son of decedent, residing in New Jersey, submitted to the Surrogate a verified answer, setting up that, on September 2nd, 1885, he had filed in the Orphans' court of Hudson county, N. J., a notice of his intention to apply for letters of administration on his mother's estate; that a citation had been issued out of that court, returnable October 10th, and that on the 12th of October he had obtained letters, upon executing a bond in the penal sum of \$16,000. His answer also declared his purpose to make application in the county for letters ancillary. On the same day, Henry Lussen filed a petition for such ancillary letters, setting forth therein the fact of his appointment to the principal administration in New Jersey.

It is contended by counsel for the petitioner, Mrs. Timmerman, that because proceedings upon her application were pending and undetermined in this court on October 10th, the day when letters were granted

in New Jersey to Henry Lussen, she is now absolutely entitled to letters in this county.

Section 2696 of the Code of Civil Procedure provides that, upon application by a foreign administrator of an intestate's estate, and upon the presentation of his foreign letters to the proper Surrogate, such Surrogate "*must* issue letters of administration in accordance therewith, except in one of the following cases: . . . . .

"2. Where an application of letters of administration upon the estate has been made by a relative of the decedent who is legally competent to act, . . . . and letters have been granted accordingly, or the application has not been finally disposed of." Now the circumstances for which this exception provides exist in the case at bar; so that, despite the application for letters ancillary, it is in the power of the Surrogate to grant Mrs. Timmerman's petition (*Weed v. Waterbury*, 5 *Redf.*, 114).

On the other hand, in exercise of his discretion, he may grant the petition for letters ancillary. This I am unwilling to do, under all the circumstances disclosed by the papers on file in these proceedings, unless the applicant shall give bond in the same amount that would be exacted from an administrator in chief. If he chooses, within five days from entry of order, etc., to give such bond he may take letters ancillary—or he may within that time take original letters—having, as he does have by virtue of the statutory preference of males to females, a right thereto in priority over his sister in spite of his non-



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HENRY V. HENRY.

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residence (R. S., part 2, ch. 6, tit. 2, § 28; 3 Banks, 7th ed., 2290).

If he shall fail to give bond, as above required, letters may issue to Mrs. Timmerman.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—Dec., 1885; Jan., March, 1886.

HENRY v. HENRY.

*In the matter of the application for revocation of probate of the will of JAMES G. HENRY, deceased.*

Although an application for a commission to take the deposition of a witness, under Code Civ. Pro., ch. 9, tit. 3, art. 2, relating to “depositions taken without the State, for use within the State,” should not be denied because the moving affidavit fails to set forth facts and circumstances calculated to satisfy the court of the materiality of the witness sought to be examined, yet where an opposing party makes it appear that material testimony could not probably be elicited upon the examination, the applicant must disclose what facts he expects to prove.

A contest respecting the *status* of a party to a special proceeding, instituted to procure the probate or revocation of probate of a will, should generally be tried, at the outset, before the taking of testimony, by commission or otherwise, touching the genuineness and validity of the disputed instrument.

One who asserts his relationship, as one of the next of kin of a decedent, and his title, as such, to contest the admission to probate of an alleged will of the latter, cannot, for the purpose of establishing his *status*, impeach, in the Surrogate’s court, a marriage between decedent and another on the ground of force or fraud in its procurement; or the validity of a judgment dissolving a prior marriage between such other person and a former consort, upon allegations that the same was obtained by collusion, and for the purpose of entering into the second marriage.

An order of a Surrogate’s court, denying a motion for the simultaneous trial of different issues joined in a special proceeding pending therein,

## 254 CASES IN THE SURROGATES' COURTS.

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HENRY V. HENRY.

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does not "affect a substantial right" (Code Civ. Pro., § 2570), and is not appealable.

Under Code Civ. Pro., §§ 1310, 2584, relating to a stay upon appeal, the perfecting of an appeal from an order of a Surrogate's court, denying an application for the issuing of a commission to take testimony to be used in a special proceeding pending therein, does not operate as a suspension of the hearing.

MOTION by Evan J. Henry, decedent's father, for an order directing commissions to issue for the examination of certain non-resident witnesses, in proceedings instituted by him for the revocation of probate of decedent's will; opposed by Sarah M. Henry, proponent of the will, and a beneficiary named therein.

RICHARDS & HEALD, *for the motion.*

F. H. CHURCHILL, *opposed.*

THE SURROGATE.—I adhere to the opinion that I expressed in *Cadmus v. Oakley* (2 *Dem.*, 298), that an application for a commission to take the testimony of a witness without the State, ought not to be denied merely because the moving party has failed to set forth facts and circumstances calculated to satisfy the court that such testimony is material. But, when the party opposing the application has made it appear that the witnesses sought to be examined could not probably give any material testimony, the moving party is bound to disclose what facts he intends to prove.

Under such circumstances, the Supreme court, in *Vandervoort v. Columbian Ins. Co.* (3 *Johns. Cas.*, 137) said: "On the whole, we think that enough is shown by the plaintiffs to render the propriety of

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HENRY V. HENRY.

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issuing the commission doubtful and suspicious, and it is incumbent on the defendants to remove this doubt by showing the particular object of the commission, and specifying the evidence they want to obtain, and in what manner it is material. If they pursue the application, by doing this, we shall then be better able to judge of the propriety of granting it. We are, therefore, of opinion that the application ought not to succeed, under the circumstances which now appear." The case just cited was subsequently approved in *Bank of Commerce v. Michel* (1 *Sandf.*, 687), and in *Rogers v. Rogers* (7 *Wend.*, 514).

I am not disposed at present to grant any application for the issuance of commissions to take testimony upon the issue of undue influence, as it is possible that that issue may not need to be tried at all. The moving party will be permitted to submit affidavits showing what material testimony, upon the preliminary issue as to who is decedent's next of kin, can be given by the proposed witnesses.

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THE following opinion was filed, in the same matter, January 22nd, 1886 :

THE SÜRROGATE.—The paper purporting to be the last will of this decedent was admitted to probate by the Surrogate on October 25th, 1883. On October 17th, 1884, decedent's father, Evan J. Henry, filed a petition, asking that such probate be revoked. In this petition it was alleged, among other things, that the making and execution of the will had been procured by fraud, circumvention and undue influence of

its proponent, Sarah M. Henry, a beneficiary thereunder, who claimed to be the decedent's widow, and to have been married to him in January, 1882.

It was further alleged, that, at the time of such marriage, and at the time of decedent's death, the proponent was not his lawful wife, but was the lawful wife of one Simmons, and that a decree entered in December, 1881, in the Supreme court, by the provisions whereof the proponent had been divorced from said Simmons, was fraudulently and collusively procured, and was therefore invalid and of no effect. The petitioner declared himself to be his son's only next of kin, and to be entitled as such to dispute the validity of the paper here in controversy. The material allegations of this petition for revocation were denied in an answer.

On March 19th, 1885, the proponent was granted an order to show cause why the issue as to the *status* of the contestant should not be tried and passed upon, before any other steps were taken in the proceeding for revocation of probate. Counsel for the several parties in interest subsequently appeared before the Surrogate. Upon the suggestion of contestant's counsel that, in the orderly progress of the cause, inquiry as to the *status* of his client would be entered upon in the first instance, in accordance with Rule 4 of this court, the application of the proponent was withdrawn. By the rule referred to, it is substantially provided that, whenever in a probate controversy, a dispute arises as to the right of the contestant to be a party to the proceeding, the Surrogate will hear and determine that question at the outset, unless it ap-

pears that a different course would on the whole be advisable.

Upon a motion made in behalf of the proponent in November last, the Surrogate made an order that "the preliminary issue as to the *status* of said contestant and the validity of the proponent's marriage to the decedent and the legitimacy of their infant son" should be placed on the calendar for trial upon a day in such order specified. Before the entry of this order, a motion had been made, on behalf of the contestant, for an order directing the examination by commission of certain witnesses named in the affidavits by which said motion was supported. In opposition to the issuance of such commissions, the proponent presented affidavits undertaking to show what testimony could be given by the persons sought to be examined, and denying that such testimony would be relevant or material to the preliminary issue, whether at the death of the decedent the contestant was or was not his next of kin and heir at law.

The Surrogate decided by his memorandum of December 14th, that, under the circumstances, the application for commissions should be denied, unless the moving party should submit additional affidavits "showing what material testimony upon the preliminary issues . . . . could be given by the proposed witnesses." On December 18th, 1885, the petitioner filed new affidavits. The motion for the issuance of commissions was then reargued on December 21st, as was also a motion for an order directing that all the issues in the probate proceeding "be heard and passed upon together and not separately."

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HENRY V. HENRY.

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The latter application must be denied. In case the petitioner for revocation of probate shall succeed in establishing his claim to be decedent's next of kin, it is likely that a protracted controversy will ensue respecting the validity of the paper heretofore decreed to be the decedent's last will. To enter simultaneously upon the latter inquiry, and upon an investigation of the petitioner's right to be a party to it, would be, as it seems to me, utterly unnecessary and unprofitable. It is very likely that some matters of evidence would be applicable alike to the preliminary issue and to issues that may present themselves for consideration when that shall have been determined. But I am confident, both from the light afforded by the affidavits herein submitted, and from the very nature of things, that the great bulk of the evidence likely to be offered and received upon the question of the validity of the will would be entirely irrelevant to a determination of the question as to the petitioner's *status*.

No case, indeed, has attracted my attention in which the practical good sense of Rule 4 has been more conspicuously illustrated than in the very case now before me. If James Griffiths Henry, Jr., is the son of this decedent, born in lawful wedlock, then Evan J. Henry is not entitled to contest this decedent's will. If, on the other hand, James Griffiths Henry, Jr., is *not* decedent's legitimate son, Evan J. Henry is himself decedent's next of kin and heir at law. The *status* of these rival claimants should first be ascertained before any testimony is taken, by commission or oth-

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HENRY V. HENRY.

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erwise, save that which is pertinent to the preliminary issue of this controversy.

It is not necessary for me to declare, at the present stage of the cause, how far, if at all, the evidence which the contestant seeks to obtain by commission may be admissible upon the question of undue influence, in case the claim of Evan J. Henry to be the decedent's next of kin shall be determined in his favor. I am now to decide this question, and this only: Would the proposed evidence, or any of it, afford legitimate aid in ascertaining whether the proponent is the decedent's widow, and whether James G. Henry, Jr., is his son?

I am clear that the contestant cannot in this proceeding be allowed to impeach the validity of the decree by which the proponent was divorced from Simmons, except by evidence tending to show that, either as regards the parties or as regards the subject matter, the court in which that decree was entered was without jurisdiction to pronounce it. This seems to me to be indisputably established by the decisions of the Court of Appeals in *Kinnier v. Kinnier* (45 *N. Y.*, 535); and in *Ruger v. Heckel* (85 *N. Y.*, 483).

In the first of these cases, the appellant, who was the husband of the respondent, brought an action for the annulment of their marriage, upon the ground that, before such marriage was solemnized, the respondent had been lawfully married to another person; that her marriage with such former husband continued to be in force, and that a pretended decree of divorce, by which it was claimed to be dissolved, was

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HENRY V. HENRY.

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invalid and ineffectual because procured by fraud and collusion. The allegations of the complaint were not disputed, and the question determined arose upon a demurrer. In sustaining that demurrer, CHURCH, J., pronouncing the unanimous opinion of the court, said: "*The wife was competent to marry because her former marriage was not then in force*, and, being competent, it is of no legal consequence to the plaintiff how she became so. Conceding fraud as alleged, he cannot avail himself of it."

In the later case of *Ruger v. Heckel* (*supra*), this doctrine was asseverated in terms equally unequivocal and still more emphatic. A., the plaintiff in that case, brought an action against B., his wife, and C., her former husband, seeking thereby an annulment of a divorce which B. had collusively obtained from C., and of the marriage which had subsequently taken place between himself and B. DANFORTH, J., pronouncing the opinion of the court, said: "In bringing this action, the plaintiff meddled with a matter that did not concern him. . . . The record which he produces shows a judgment binding upon both parties. . . . It is impossible to discover any ground in law or morals upon which the complaint can stand. . . . The court regards the plaintiff as a suitor without a cause of action, and rejects his petition, because he is not aggrieved. The parties to the judgment do not complain, nor does either of them ask aid from the court. . . . The court which rendered the judgment had jurisdiction over the subject matter and the parties, and they are bound by it."

In the case just cited, it was strongly urged in be-



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HENRY V. HENRY.

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half of the plaintiff that he was entitled to the relief sought because the collusion and falsehood by which his wife had obtained a divorce from her former husband were parts of a fraudulent scheme to which both the defendants were parties, and which had for its ultimate object the bringing about of a marriage between himself (the plaintiff) and the female defendant. That is the very ground upon which the contestant plants himself in the case at bar. But if this decedent, in his lifetime, would have been powerless to procure the annulment of the divorce between the proponent and Sinmons, that divorce cannot now be impeached by decedent's father in protection of any property rights that he might enjoy as his son's next of kin, in case it shall be discovered that the son never contracted a lawful marriage.

As strong a claim, upon the score of property rights, as the contestant here sets up might have been urged by the parties plaintiff in the two cases above cited. In each of them, the decision of the Court of Appeals secured to a wife from whom her husband was seeking to free himself, the right of dower in such real property as that husband had or might subsequently acquire, the right to call upon him for support, and the right, in case he should die intestate, of sharing in his personal estate under the Statute of Distributions.

The contestant further claims that he should be permitted to offer evidence tending to impeach the marriage between the proponent and the decedent, on the ground of force, duress and fraud which the proponent is claimed to have employed in bringing

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HENRY V. HENRY.

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about such marriage. This claim is not, in my judgment, well founded. If the marriage was duly solemnized, its existence and effects cannot, upon any such grounds, be ignored in this proceeding. It is provided by R. S., part 2, ch. 8, tit. 1, § 4 (3 Banks, 7th ed., 2332), that "when either of the parties to a marriage shall be incapable, for want of age or understanding, of consenting to a marriage, or shall be incapable, from physical causes, of entering into the marriage state, or when the consent of either party shall have been obtained by force or fraud, the marriage shall be void *from the time its nullity shall be declared by a court of competent authority.*"

In a proceeding such as this, the Surrogate can no more disregard a marriage, which is assailed because of force or fraud in its procurement, than he can disregard a marriage sought to be impeached on account of alleged want of age or alleged mental or physical incapacity. Parties entitled to relief upon any of these grounds must resort to another tribunal for the remedies provided by the Code of Civil Procedure (§§ 1743, 1747, 1750, etc).

Upon careful consideration, I am satisfied that none of the testimony which the contestant seeks to obtain from the witnesses named in his affidavits would be pertinent to what I have styled the preliminary issue of this controversy.

The application for commissions must, therefore, be denied, without costs, and without prejudice to its renewal in case the contestant's claim to be decedent's next of kin shall be hereafter sustained.

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HENRY V. HENRY.

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THE contestant having made a motion that all the issues joined in the proceeding for revocation of probate be tried simultaneously,—which was denied,—and the like disposition having been made of the application for the issuing of commissions, appeals were taken from the respective orders; whereon questions arose which were decided as shown by the following opinion, filed March 16th, 1886 :

THE SURROGATE.—The procedure relating to appeals from decrees and orders of this court is established by ch. 18, tit. 2, art. 4 of the Code. Section 2570 provides that an appeal may be taken from any decree or from any order “affecting a substantial right.” It is declared by § 2584 that, except as otherwise expressly prescribed, “a perfected appeal has the effect, *as a stay of proceedings to enforce the decree or order appealed from*, prescribed in § 1310, with respect to a perfected appeal from a judgment.”

By operation of § 1310, such an appeal effects a stay of all proceedings to enforce a judgment or order appealed from, “except that the court or judge from whose determination the appeal is taken may proceed in any matter included in the action or special proceeding, and not affected by the judgment or order appealed from, or not embraced within the appeal.”

Now I do not think that, by force of the statute just quoted, the appeals which have been taken by Evan J. Henry from the two orders lately made by the Surrogate have operated to stay the trial of this probate controversy which is now reached regularly on the calendar. The order denying the motion for

union of the issues theretofore directed to be separately tried, cannot be held to involve "a substantial right" within the meaning of § 2570. It affects mere modes of procedure that are entirely within the control of the trial court (*Arthur v. Griswold*, 60 *N. Y.*, 143; *Whitney v. Townsend*, 67 *N. Y.*, 40; *Miller v. Porter*, 17 *How. Pr.*, 526). The order denying the motion for the issuance of commissions is doubtless appealable (*Uline v. N. Y. Central R. R. Co.*, 79 *N. Y.*, 175; *Wallace v. Am. Lin. Thread Co.*, 46 *How. Pr.*, 403); but in what manner and to what extent, if at all, is the appeal which has been taken effectual as a "stay," within the meaning of § 1310? If the Surrogate had made an order *granting* the application for commissions, it is clear that a perfected appeal would have operated to prevent their issuance; but an appeal from an order *denying* such an application does not, it seems to me, have practical operation as a stay at all.

It has never been held, so far as I can ascertain, that an appeal, either from an order denying or from an order granting a commission, accomplishes *per se* a suspension of the trial of the action or proceeding for the purposes of which the aid of the commission has been sought. The mischiefs that would result from such a practice can scarcely be overestimated. The court of original jurisdiction would lose all control of its calendar. It would be utterly powerless to compel the trial of a cause, if it suited the pleasure of any of the parties thereto, even on the most frivolous pretext, to move for the issuance of a commission, and to appeal from an order denying his motion. If

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BILLINGS V. STEWART.

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such were the true state of the law, the fact would long since, I think, have been ascertained and promulgated. If the Surrogate has erred in denying the contestant's application for the issuance of commissions, the error will be in due time corrected, and the order of denial reversed. Besides, in case the trial of the cause shall now be directed to proceed, the contestant can except to that direction, and avail himself of that exception by appeal, in the event that a decree shall be hereafter entered adverse to his interests. The trial must proceed.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—December, 1885.

## BILLINGS v. STEWART.

*In the matter of the estate of JOSEPH B. STEWART, deceased.*

Although the lien acquired by a judgment creditor, by the commencement of proceedings supplementary to the execution, is not divested by the death of the debtor, it cannot be enforced, in a Surrogate's court, against the assets of the estate of the decedent, unless, during the lifetime of the latter, the creditor procured the appointment of a receiver, or an order directing the application of the debtor's property in satisfaction of the judgment.

PETITION by Henry E. Billings, a judgment creditor of decedent, for a decree directing William D. Stewart, administrator of the estate of the latter, to pay the amount of his claim. The facts are stated in the opinion.

S. E. FAIRCHILD, *for creditor.*

B. H. BAYLIS, *for administrator.*

THE SURROGATE.—This decedent died in August, 1882. In November previous, at the suit of this petitioner, a judgment had been recovered against him in the Supreme court for the sum of \$1,018.58. Execution was at once issued thereon, and a few days later was returned unsatisfied. On December 7th, 1881, LAWRENCE, J., made an order in supplementary proceedings, whereby the decedent was “forbidden to transfer or make any other disposition of the property belonging to him, not exempt by law from execution, or in any other manner to interfere therewith until further order in the premises.” The order of Mr. Justice LAWRENCE was duly served upon the judgment debtor, who thereafter appeared as directed by such order, and was sworn and in part examined.

Pending an adjournment of these proceedings supplementary, and on the 10th of January, 1882, an order was made at a special term of the Supreme court, upon application of the judgment debtor, allowing him to come in and defend upon certain specified conditions, and directing that the “judgment, supplementary proceedings injunction, etc., stand as security.” A copy of this order was served upon Stewart on January 18th, 1882. Pending the trial of the action which ensued, Stewart died. The action was subsequently revived against his administrator, and such proceedings were had that, in August, 1883, a judgment was entered in favor of this petitioner for the sum of \$1,372.87.

When the supplementary proceedings were commenced, the decedent had a certain claim against the Kansas Pacific R. R. Co. Since his death, this claim has been compromised by his administrator, who has received in settlement thereof the sum of about \$8,000. I am now asked to direct the administrator to pay the amount of the petitioner's judgment. The respondent claims that all funds that have come to his hands have been necessarily expended by him in defraying the reasonable expenses of administration. The petitioner insists that even such expenses should be held subordinate to his claim, and in support of his contention cites *Storm v. Waddell* (2 *Sandf. Ch.*, 494); *Edmonston v. McLoud* (16 *N. Y.*, 543); *Brown v. Nichols* (42 *id.*, 26); and *Lynch v. Johnson* (48 *id.*, 27).

There can be no doubt that, if the lien which the judgment creditor acquired by the commencement of supplementary proceedings had been in the decedent's lifetime perfected by the appointment of a receiver, the receiver's title as trustee of such creditor would have been perfect, as against an administrator appointed after decedent's death (*Chautauque Bank v. Risley*, 19 *N. Y.*, 369; *Bostwick v. Menck*, 40 *id.*, 383; *Becker v. Torrance*, 31 *id.*, 631; *Code Civ. Pro.*, § 2468).

Sections 2447, 2448 and 2449 of the Code provide that, where it shall appear, from testimony in proceedings supplementary, that property of the judgment debtor is in the possession or under the control of himself or some other person, the judge by whom the order or warrant was granted, or to whom it is

returnable, may, in his discretion, there being no receiver, make an order directing the judgment debtor or such other person to deliver such property to the sheriff. When so delivered, the property is to be treated as if it had been levied upon by virtue of an execution. Where there is a receiver, the judge is authorized to direct the sheriff to pay to him the moneys or proceeds of property that have come to his hands in the special proceeding, etc., or if it appears to the judge's satisfaction that the services of a receiver are not necessary, he may, by an order reciting that fact, direct the sheriff to apply the money or proceeds upon an execution in favor of the judgment creditor.

Now this petitioner's proceedings in the Supreme court have never culminated either in the appointment of a receiver or in the entry of such an order as is contemplated by the Code.

In *Edmonston v. McLoud* (*supra*), HARRIS, J., pronouncing the opinion of the Court of Appeals, in a case arising under the former Code of Procedure, whose provisions as regards the question here presented are not essentially different from those now in force, said: "By the commencement of the proceedings supplementary to execution against his judgment debtor, the plaintiff acquired an inchoate lien upon his interest in the lot purchased of Woods. But to perfect this lien and secure the benefit of his proceedings, it was necessary that he should obtain an order under the 297th section of the Code directing the property of his debtor to be applied in satisfaction of



his judgment, and also procure the appointment of a receiver to carry that order into effect."

In *Becker v. Torrance* (31 *N. Y.*, 631), Judge JOHNSON declared (p. 641) that "the proceeding supplementary to execution is a proceeding for the discovery and sequestration of the debtor's property for the purpose of satisfying and discharging the judgment. But no right is acquired, as against other creditors pursuing different remedies, until the appointment of the receiver."

It was said by EARL, J., in *Brown v. Nichols* (*supra*) that the lien that a judgment creditor obtains by commencing an action in the nature of a creditor's bill to collect a judgment, is not divested by the death of the debtor, and that the debtor's property passes to his personal representatives, subject to such lien.

In *Lynch v. Johnson* (*supra*) the Commission of Appeals held that the commencement of a proceeding under § 294 of the former Code gave a creditor an immediate lien, and was to be regarded as an "actual levy upon the equitable assets of the debtor." It is clear, upon reference to the opinion of EARL, C., that he did not intend by this language to assert any broader doctrine than had already been pronounced in *Storm v. Waddell* and in *Brown v. Nichols*, the two cases cited in its support.

In proceedings supplementary, there is nothing corresponding to "actual levy," until the appointment of a receiver or the entry of an order directing the application of the property involved for the benefit of the party instituting the proceedings. I

think, therefore, that this petitioner must apply for relief to the Supreme court. If his claim to priority is well founded, it is because the equitable assets of this decedent were, in decedent's lifetime, locked up in his own hands by the injunction, and, since his death, have continued to be under the control of the Supreme court for enforcing the lien of petitioner's judgment.

The petitioner virtually says in his appeal to the Surrogate: "The funds that have come to the respondent's hands as assets of this estate are, as such, distributable by him among creditors less vigilant than myself only so far as they may exceed the amount of my judgment; a sum sufficient to meet that judgment belongs to me in the first instance." Now this proposition may very likely be sound, but if it is, then, until the petitioner's claim is satisfied, the assets in question are not subject to the jurisdiction of the Surrogate at all. It seems to me that in this respect there is a close analogy between the effect of proceedings supplementary and that of proceedings for attachment. In *Thacher v. Bancroft* (15 *Abb. Pr.*, 243) it was held by INGRAHAM, P. J., that, by the allowance of an attachment, a plaintiff acquired a right in the property attached, not to be defeated by the death of the debtor, if the action survived and the court had power to continue it against the debtor's representative. It was further held that, after the death of a debtor, the court in which judgment might be recovered against his representative could issue execution thereon, and that the action could proceed in that court, irrespectively of the provisions of law

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JONES v. M. E. SUNDAY SCHOOL.

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respecting the issuance of execution by Surrogates, etc.; that the execution was but a continuance of the attachment and was necessary to secure the devotion of the attached property to the payment of the debt for which it was liable.

The application of this petitioner must be denied. No costs to either party.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—December, 1885.

JONES v. M. E. SUNDAY SCHOOL.

*In the matter of the estate of JOHN W. JONES, deceased.*

A legacy to a society, incompetent to take at the testator's death, because not then incorporated, is nevertheless effectual if not intended to vest until a later date,—at which the legatee has acquired a corporate character and is authorized to receive the benefit.

Testator's will devised certain property to A., in trust for his life, directing that, *at the death of the cestui que vie*, the same "be sold, and one third of the amount received be given to B., and \$100 of the remainder be given to C., and the residue I bequeath to" a society named. It further provided: "Whatever interest I may have in other real estate I devise the same to A., for life, and at his death to be converted into money and given to" the same society.—

*Held*, that, by the terms of the will, the subject of the bequests to the society did not come into existence, and, therefore, the same did not vest, until C.'s death.

Warner v. Durant, 76 N. Y., 133—followed.

CONSTRUCTION of will of decedent, upon admission of same to probate, at the instance of Frederick Jones, his only son and heir at law, contestant.

## 272 CASES IN THE SURROGATES' COURTS.

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JONES V. M. E. SUNDAY SCHOOL.

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WILSON S. WOLF, *for proponent.*

JOHN M. MARTIN, *and* GEO. S. COLEMAN, *for contestant.*

THE SURROGATE.—The fourth clause of this decedent's will is in these words: "I devise to my brother Gabriel my home in Washington, D. C., for life, in trust for my son Frederick (that is, my son to have the rents and profits) Jones, and at the death of my brother Gabriel, the above described house and lot is to be sold, and one third of the amount received be given to my son, Frederick Jones, and \$100 of the remainder be given to William T. Baker, and the residue I bequeath to the Sunday school of St. Paul's A. M. E. church of Washington, D. C."

At the time of the controversy over the probate of this will, the contestant claimed that this provision in favor of the Sunday school at Washington was invalid. In a memorandum, wherein I held that the will was entitled to probate, I said that, if there was any dispute as to whether the Sunday school had been incorporated, or as to its competency if incorporated, to take under Washington law, I would, before entry of a decree admitting the will to probate, receive evidence upon those points.

A certificate of the incorporation of St. Paul's A. M. E. church Sunday school of the District of Columbia has since been put in evidence on behalf of the executors. It appears, by that certificate, that the corporation was formed in July last, after the death of the testator. The contestant claims that, as the Sunday school was not in existence as a corporation when the testator died, the legacy in its behalf is invalid.

This contention is well founded or erroneous, as it shall appear that the legacy in question was intended to vest immediately upon the death of the testator, or afterwards, upon the death of his brother Gabriel, who survived him, and who is still living. In the one case, the subject of the legacy not being disposed of by the will, vested at once in the testator's next of kin, and of course could not be divested by the subsequent incorporation of the Sunday school. But if, on the other hand, the legacy was not intended to vest until the death of the testator's brother, the Sunday school, if it shall be then duly incorporated and competent to take under Washington laws, will become entitled to its legacy (*Shipman v. Rollins*, 98 *N. Y.*, 311).

It was held by the Court of Appeals, in *Warner v. Durant* (76 *N. Y.*, 133), that "where there is no gift but by direction to executors or trustees to pay or divide, and to pay at a future time, the vesting in the beneficiary will not take place until that time arrives." This doctrine seems to me to be applicable to the case at bar. The real estate is given to testator's brother as trustee during his life; at his death, it is to be sold and the proceeds are to be then distributed. Not until that time will the subject of the bequest to the Sunday school come into existence. Under similar circumstances it was held, in *Vincent v. Newhouse* (83 *N. Y.*, 505), and *Delaney v. McCormack* (88 *N. Y.*, 174), that a legacy did not vest at the death of a testator.

The testator whose will was under consideration in *Shipman v. Rollins* (*supra*) was, in the estimation of

the Court of Appeals, "looking to a future and not a present vesting of the bequests. He first provided for the support of his wife during her life, and then for a disposition of the proceeds of his estate which might remain after her death. It was at this time, and not before, that the legacies named were to take effect. He expressly declares that 'then' the balance of said fund shall be divided. Until then it could not be divided, and was to be held for the purposes named in the will. Prior to that time, it was given to nobody, and it was only after the death of his widow that the division could be made, and these provisions of his will carried out. It was 'then,' as the will says, 'I give.'"

I cannot distinguish the case at bar from the one just cited, and, accordingly, hold that the legacy to the Sunday school has not yet vested, and will not vest during the lifetime of Gabriel Jones.

I may add that the Sunday school does not seem to be competent at present to take a testamentary bequest. It appears by the certificate of incorporation that it claims to be a body corporate under and by virtue of §§ 533 and 534 of the Revised Statutes of the District of Columbia. The former of these sections declares that any society formed for the purpose of religious worship may receive by gift, devise or purchase, a quantity of land not exceeding an acre, but does not authorize the acceptance of personalty bequeathed by will. The clause claimed to be invalid may, nevertheless, become effectual in the event that the Sunday school shall be duly incorporated and legally competent to accept the legacy when the time shall arrive for its vesting.

SCHMIDT V. HEUSNER.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—December, 1885.

SCHMIDT v. HEUSNER.

*In the matter of the estate of ANDREAS SCHMIDT,  
deceased.*

Under Code Civ. Pro., § 2514, subd. 11, providing that, where “a person interested” is permitted by ch. 18 to “apply for an inventory,” etc., “an allegation of his interest, duly verified, suffices, although his interest is disputed,” one of the next of kin of an intestate may obtain such relief, in spite of an averment that he has executed an assignment of his share, which he assails as void for fraud in its procurement.

APPLICATION by Andrew Schmidt, a son, and one of the next of kin of decedent, for an order directing Annie Heusner and another, administrators of the latter, to file an inventory.

M. C. GROSS, *for the application.*

LOUIS COHEN, *for administrators.*

THE SURROGATE.—This decedent died intestate. To an application made by his son, one of his next of kin, for an order directing the administrators of the estate to file an inventory, the administrators have interposed an answer in which, they allege that the petitioner is not a person interested in the estate, and that, before the making of this application, he sold, assigned and transferred to Annie Heusner, one of the respondents, all his right, title and interest in and

to any effects left by his deceased father. This answer the petitioner meets by an affidavit wherein, among other things, he sets up that his signature to the alleged assignment was procured by fraud practiced on him by the respondent.

Upon this state of facts, the petitioner's application must be granted. It was held by Surrogate BRADFORD, in Thomson v. Thomson (1 *Bradf.*, 24), that the mere appearance of an interest on the part of an applicant is ordinarily sufficient to authorize an order for the filing of an inventory or account, even though the claim of interest is contested by the executor or administrator. Such is now the doctrine of the Code of Civil Procedure (§ 2514); such, also, was formerly the course of procedure in the Ecclesiastical courts (Kenny v. Jackson, 1 *Hagg.*, 105; Smith v. Price, 1 *Lee*, 569; Philipson v. Harvey, 2 *Lee*, 344; Gale v. Luttrell, 2 *Add.*, 234; Wainford v. Barker, 1 *L'd Raymond*, 232); and such has been the general practice of the Surrogate's court of this county (Burwell v. Shaw, 2 *Bradf.*, 322; Cotterell v. Brock, 1 *Bradf.*, 148; Fraenznick v. Miller, 1 *Dem.*, 136, and cases cited at p. 154; Creamer v. Waller, 2 *Dem.*, 351).



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BUCKHOUT v. FISHER.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—December, 1885.

BUCKHOUT v. FISHER.

*In the matter of the probate of the will of THOMAS FISHER, deceased.*

There is no such rule, in this State, as that words or acts which satisfy the statutory requirements in regard to publication of an instrument as a will, and request to witnesses to attest the same, necessarily include a compliance with those relating to the testator's signature, and his acknowledgment thereof.

Upon an application for the probate of an instrument purporting to be the will of decedent, it appeared that the same was written upon one side of a piece of paper, eight by ten inches in size, decedent's signature being in its proper place, at the end. Decedent did not subscribe his name in the presence of either witness, and did not expressly acknowledge his signature to either, nor was it shown that either of them saw such signature at the time of the attestation, though the entire paper was necessarily exposed to their view, and declared by decedent to be his will.—*Held*,

1. That the court was authorized to infer, from internal evidence, which the paper afforded, that it bore decedent's signature when presented to the witnesses.
2. That the exposure to them of the entire contents of the paper, accompanied with a declaration of its testamentary character, and request to sign, constituted a sufficient acknowledgment by decedent of his signature within the requirement of the statute of wills (2 R. S., 63, § 40).

Blake v. Knight, 3 Curt., 547—compared; Baskin v. Baskin, 36 N. Y., 416; Mitchell v. Mitchell, 16 Hun, 97—explained.

APPLICATION for the probate of decedent's will, made by Augusta Fisher, therein nominated executrix; opposed by Sarah E. Buckhout, and others, decedent's next of kin. The facts are stated in the opinion.

W. S. SMITH, *for proponent.*

D. R. SHEIL, and M. J. KEOGH, *for contestants.*

W. H. HAMILTON, *special guardian.*

THE SURROGATE.—The probate of this paper is opposed upon the ground of its defective execution. It is not disputed by counsel for the contestant that the decedent's signature appears in its proper place, at the foot of the instrument, nor is it disputed that the two persons who purport to have acted as attesting witnesses wrote their names as such at decedent's request, and with knowledge derived from his then present declaration that the paper thus attested was his last will. But it is insisted that, neither at the time of this attestation and declaration, nor at any other time, did the decedent subscribe this paper in the presence of such witnesses, or either of them, or in the presence of both, or either, acknowledge that the paper had been by him subscribed.

That the act of subscription, or the act of acknowledgment of subscription, must take place in the presence of each of at least two attesting witnesses is of course conceded. The proponent of this will does not claim that either of its attesting witnesses saw the testator sign it. Nor is it claimed that to either of such witnesses the testator expressly and in terms declared that the paper had been by him subscribed.

It is nevertheless insisted by the proponent and the special guardian of certain infant next of kin, that to both these witnesses the decedent's signature was substantially and sufficiently "acknowledged," within the meaning of that word as used in our Statute of

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BUCKHOUT V. FISHER.

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Wills (R. S., part 2, ch. 6, tit. 1, § 40; 3 Banks, 7th ed., 2285).

The disputed instrument, save for the names of the witnesses and the date of their attestation, is wholly in the handwriting of the decedent. It is written on one side of a single piece of paper, eight by ten inches in size. It begins as follows:

“MOTT HAVEN, November 24, 1876.

“I, Thomas Fisher, of the City of New York, in the State of New York, do make and publish this as my last will and testament.”

Then follow the dispositive clauses, and a clause appointing decedent's wife as his executrix, and then the words:

“Witness my hand and seal, this November 24, 1875.

“THOMAS FISHER.

“At Mott Haven, on November 24, 1876, the above named Thos. Fisher signed and sealed this instrument, and declared the same his last will; and we, in his presence and at his request, have subscribed our names as witnesses.

“NATHAN S. KING.

“S. H. MCILROY.

“December 2, 1876.”

McIlroy was not asked and did not testify at the trial whether or not he saw the name of the decedent at the time he wrote his own, or whether or not in his presence the decedent acknowledged his subscription to the paper.

King, the other attesting witness, did not state, upon his direct examination, that he saw the decedent's signature, or that he heard anything said about it. Upon cross-examination, his testimony was as follows:

Q. Do you remember if that name Thomas Fisher was on the paper when you signed it?

A. It was.

Q. How did you come to notice that?

A. I could not help it; I looked on the paper. . . . .

Q. You distinctly remember having looked at that paper and seeing that?

A. It is in the same handwriting—the whole paper.

Q. You now distinctly remember having seen it on that day?

A. I do not know how I could help but notice if I saw that paper with his name attached to it.

Q. That is not the question: Do you now remember having seen it?

A. I do not know that I could say that I did. . . . . It would not have been his will if his name had not been attached to it. . . . . I did not make any attempt to see if Thomas Fisher's name was attached to it.

Q. Have you any distinct recollection that his name was there at the time you signed it?

A. Not to say that his name was there.

Now, upon this state of facts, two questions present themselves for determination—

1st. Did this disputed paper bear the signature of Thomas Fisher when it was produced by him before the subscribing witnesses? And if yea, then,

2nd. Did the circumstances attending this production involve Fisher's acknowledgment of that signature within the meaning of the law?

It will be convenient for me to consider in the first instance the latter of these two questions.

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BUCKHOUT V. FISHER.

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*First.* Assuming then, for the present, an affirmative answer to question first, was the signature of Thomas Fisher duly acknowledged by him to the attesting witnesses?

It is claimed by proponent's counsel that all doubts that might have once arisen upon this subject are resolved by two recent decisions of the Court of Appeals (Matter of Phillips, 98 *N. Y.*, 267; and Matter of Higgins, 94 *N. Y.*, 554). In the former case, as in the case at bar, the alleged will was holographic, occupied but a single page, and was exhibited unfolded to the subscribing witnesses, so that the signature of its maker must necessarily have been exposed to their view. Indeed, an examination of the case on appeal (Bar Ass'n series, vol. 1, 1885) has disclosed the fact that such signature was actually observed by both such witnesses, and that to each of them the testator expressly acknowledged that the paper bore his subscription.

It was upon this state of facts that RAPALLO, J., in the course of his opinion (concurred in by all the members of the court except RUGER, C. J., who did not vote) said: "The exhibition of the will and of the testator's signature attached thereto, and his declaration to the witness that it was his last will and testament, and his request to the witness to attest the same were, we think, a sufficient acknowledgment of the signature and publication of the will."

The other case on which this proponent especially relies is Matter of Higgins (94 *N. Y.*, 554). A holographic will was there assailed for the alleged failure of the testator to affix or to acknowledge his signa-

ture in presence of the attesting witnesses. One of those witnesses swore that the signature was in fact expressly acknowledged both to himself and to his fellow witness (see case on appeal, Bar Ass'n series, vol. 1, 1884). MILLER, J., writing in favor of sustaining probate, said: "We think that the testimony of Jones [the other attesting witness], who swore positively that the testator acknowledged the will to be his last will and testament was [proof of] an acknowledgment of his signature, and sufficient *with the other evidence given by him* to establish a due execution of the will."

This "other evidence" included among other things the statements following: "I cannot now detail all the circumstances. I was so busy. . . . I can't swear whether the testator said that was his signature or not. . . . I have no recollection one way or the other." Such was the evidence before MILLER, J., when he said: "The signature was plainly visible upon the instrument itself, and the testator having requested Jones and Stoker to subscribe their names to it as witnesses, and he having acknowledged the paper to be his last will and testament, the statute was fully complied with."

The language quoted from the decisions of the two cases above referred to is certainly very comprehensive. When it is read apart from the context, and without careful scrutiny of the facts to which it is applied, it seems to stop little short of asserting that, as regards a signed holographic instrument at least, a mere acknowledgment by its author that it is his will is of itself a sufficient acknowledgment that he

## BUCKHOUT V. FISHER.

has subscribed it. I do not understand, however, that a proposition so broad as that is meant to be enunciated in *Matter of Phillips*, or in *Matter of Higgins*.

The Court of Appeals has recently, in *Matter of Hewitt* (91 *N. Y.*, 261), referred with approval to the decision in *Remsen v. Brinckerhoff* (26 *Wend.*, 325), to the effect that there are four distinct statutory directions regarding the execution of a will, among which publication by the testator is one, and signing or acknowledging his signature in the presence of witnesses is another; and that each of these requirements is as essential as any of the others to a valid execution of a testamentary paper.

No court in this State has ever held, so far as I have discovered, that words or acts which satisfy the statutory requirements in regard to publication and request are of necessity sufficient to satisfy also the requirement in regard to signing or acknowledgment.

If one, undertaking to execute his will, should privily sign it, and then coming into the presence of witnesses, should simply say to them: "This is my will; I wish you to attest it," he would thereby fully comply with the statute so far as concerns publication and request; but if he failed to inform the witnesses of the fact of the signature, and failed also to produce or exhibit the paper so that the witnesses could, if they chose, discover for themselves that it had been signed, he would fall short of effecting a valid execution.

*Chaffee v. Bapt. Miss. Conv.* (10 *Paige*, 85), and *Lewis v. Lewis* (13 *Barb.*, 17; 11 *N. Y.*, 225) contain expositions of the law relating to this subject, which have repeatedly received the approval of our highest

courts. The facts disclosed in those cases, however, differ in very important particulars from the case at bar.

In *Chaffee v. Bapt. Miss. Conv.*, it was shown by the attesting witnesses that the decedent took from a drawer the disputed instrument, upon which her name had been already written, and putting her finger on such name, said: "I acknowledge this to be my last will." She did not state to the witnesses that she herself had subscribed her name, or that it had been subscribed by her direction, or, indeed, that she knew it was then upon the face of the paper, and there was no evidence from any source that she could read or write. In the course of his opinion, in denial of probate, the Chancellor said: "There was no evidence that the name was subscribed by the direction of the testatrix. . . . the will may have been brought to her precisely in the form in which it appeared when she took it out of the drawer." These words point to an essential difference between the case under consideration by the Chancellor and the case here to be determined, where it is not disputed that the subscription to the paper propounded is in the proper handwriting of the decedent.

There is no less dissimilarity between the circumstances of the present case and those of *Lewis v. Lewis* (*supra*). There, as here, the attesting witnesses did not see the decedent subscribe the paper propounded, and did not hear him make express acknowledgment of his signature. But there the contents of the alleged will were utterly concealed, and concealed designedly, from the observation of the witnesses.



Commenting upon these facts, ALLEN, J., pronouncing the opinion of the Court of Appeals, said: "If the party does not subscribe in their presence" (that is, in the presence of the attesting witnesses), "then the signature must be shown to them and identified and recognized by the party, *or in some apt and proper manner* acknowledged by him as his signature. The statute is explicit, and will not be satisfied with anything short of a substantial compliance with its terms.

. . . . . A signature neither seen, identified, or in any manner referred to as a separate and distinct thing, cannot, in any just sense, be said to be acknowledged by a reference to the entire instrument by name, to which the signature may or may not be at the time subscribed."

It seems to me that there is nothing in this language from which it can be fairly inferred that, in Judge ALLEN's estimation, a testator's signature might not be sufficiently acknowledged *by his production of the paper bearing such signature to the subscribing witnesses, and by his intentional exposure of such signature to their observation* at the time of declaring to them that the paper was his last will, and requesting them to act as witnesses to its execution.

Such acts on the part of a testator have always been held by the English courts to be a sufficient compliance with the Victoria Statute of Wills, whose requirements respecting the presence of witnesses at the testator's signing or acknowledgment of his signature are no less stringent than those of our own law. The following cases, among others, were very elaborately discussed by DENIO, J., in *Peck v. Cary* (27 N.

*Y.*, 9); *Matter of Mary Warden* (2 *Curt.*, 334 [1839]); *Gaze v. Gaze* (3 *Curt.*, 451 [1843]); *Blake v. Knight* (3 *Curt.*, 547 [1843]); and *Cooper v. Bockett* (4 *Moo. P. C. C.*, 416 [1845]). In an opinion in which four of his associates concurred, and from which only one declared his dissent, Judge DENIO said: "I am satisfied that the doctrine established by these cases is sound and consonant with the spirit of our statute."

One of the cases thus referred to (*Blake v. Knight*) was singularly like the case now before me for decision. The will was holographic, covered only one page of paper, and was exposed to the view of the witnesses. Those witnesses might have seen the testator's signature. It did not appear that they did, in fact, see it, and there was no acknowledgment of such signature other than may have been involved in the circumstances above recited. The court declared itself satisfied that the name of the testator was upon the paper when it was produced to the witnesses, and that, as the instrument was written by the testator's own hand, its very production by him, under the circumstances disclosed, was a sufficient acknowledgment of his signature.

*Peck v. Cary* (*supra*) was decided in 1863. Four years later, the court of Appeals, in *Baskin v. Baskin* (36 *N. Y.*, 416), PORTER, J., pronouncing an opinion, in which all his associates concurred, except PARKER and GROVER, JJ.,—held that, "when a testator produces a paper to which he has personally affixed his signature, requests the witnesses to attest it, and declares it to be his last will and testament, he does all that the law requires. It is enough that he verifies

the subscription as authentic, without reference to the form in which the acknowledgment is made; and there could be no more unequivocal acknowledgment of a signature thus affixed than presenting *it* to the witnesses for attestation, and publishing the paper so subscribed as his will." I have italicized the word "*it*," in the sentence last quoted, to emphasize its relation to the word "signature." This case has been sometimes mistakenly referred to as tending to do away with the distinction so clearly indicated in *Lewis v. Lewis*, between a testator's acknowledgment of a paper as his will, and his acknowledgment of his signature as a subscription to such will. The gist of the decision, as I understand it, is that when a testator's request to witnesses to attest as his will a paper that he has already signed is accompanied by an actual exhibition and disclosure of such paper so signed to the witnesses, there is a virtual acknowledgment by the testator of his signature.

It was not disputed, by the proponents of the Baskin will, that one of the witnesses neither saw the testator sign nor heard him acknowledge his signature. But it was evident, from the circumstances attending the execution, that such signature stood revealed to both witnesses when they attached their names to the paper, and that this revelation was with the knowledge and by the procurement of the testator himself.

The case of *Mitchell v. Mitchell* (16 *Hun*, 97); decided in 1878 by the Supreme court in the Third Department, and subsequently affirmed on appeal (77 *N. Y.*, 596) is claimed by the contestant's counsel to be a strong authority in his favor. In that

case, the alleged testator produced a paper in the presence of two witnesses, saying: "I have a paper that I want you to sign." One of the two took the paper, examined it, ascertained its character, and saw the signature of its maker. The other was not offered, and did not seek an opportunity to make any examination. The decedent then said to both witnesses: "This is my will; I want you to witness it." Both thereupon affixed their names. Held, that the facts did not constitute a sufficient acknowledgment of the decedent's signature. Judge LEARNED, pronouncing the opinion of the Supreme court, said: "It does not appear that Hawkes, one of the witnesses, saw the testator's signature, and therefore it cannot be said that the testator acknowledged that signature to him. *Acknowledgment of the signature must include the same identification of the written words as necessarily exists when the witnesses see the testator write.*"

The affirmance of this judgment by the Court of Appeals was without an opinion, and without any intimation of its agreement or disagreement with the opinion below. It cannot, therefore, be justly regarded as an approval of the language just quoted from Judge LEARNED's opinion, but simply as an approval of the conclusion of the Supreme court that the paper in question was not entitled to probate. One of the subscribing witnesses did not see the alleged testator sign, did not hear him acknowledge his signature, did not see the signature itself, could not have seen it, and could not have been expected to see it, as the paper, when it was handed to him for his signature, "was folded four double," so as to conceal

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BUCKHOUT V. FISHER.

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all its contents except the attestation clause (see Court of Appeals Cases, 1879, vol. 1, Bar Ass'n series). And yet the denial of probate was sustained by a divided court, CHURCH, C. J., and FOLGER, ANDREWS and EARL, J.J., concurring for affirmance, while RAPALLO, MILLER and DANFORTH, J.J., declared themselves for reversal.

Robinson v. Smith (13 *Abb. Pr.*, 359) was decided by the Supreme court in the Seventh District in 1860. It sustained Surrogate HADLEY of Seneca county in his finding that a testator's signature to a testamentary paper was sufficiently acknowledged by his declaration to the subscribing witnesses that such paper was his will, provided that the signature was in fact seen by the witnesses.

In Conboy v. Jennings (1 *T. & C.*, 622), determined by the Supreme Court in the First Department in 1873, the will and the testator's signature thereto were seen by the attesting witnesses at the time when the paper was produced by the testator, and when he made the customary request and publication. Held, that this production of the paper was itself an acknowledgment of the signature. The same doctrine was upheld by the Supreme court in the Fourth Department, in Kinne v. Kinne (2 *T. & C.*, 391 [1873]). In McMillen v. McMillen (13 *Week. Dig.*, 350 [1881]), a case where a testator had neither signed nor expressly acknowledged his signature in presence of the witnesses, the same court held that the will was nevertheless proved, as, at the time of its execution, such signature had been "open to view." That conclusion

## BUCKHOUT V. FISHER.

seems to me sound, both in reason and upon the authority of the cases above cited.

*Second.* I have thus far taken it for granted that Thomas Fisher affixed his signature to this paper before it was presented by him to the attesting witnesses. I find, upon all the evidence, that such was the fact. Upon this subject, I have already stated the substance of the testimony of the witness King. He was unable to declare, as a matter of pure recollection of a transaction that took place seven years previously, whether or not he saw Fisher's signature on this paper when he himself signed it. That he thinks he did is very evident. But it is equally evident that his confidence springs from his conviction that if, at the time of execution, Fisher's name had not been apparent on the paper, its absence would then have attracted his attention, and would not afterward have been forgotten. The lack of proof due to King's defective memory cannot be supplied, as the proponents would have it, by the recital of the attestation clause; for the undisputed evidence shows that the attestation clause does not recite the facts. It is not true, and it is not claimed to be true, that this paper was signed by the testator in the presence of either of the subscribing witnesses.

The internal evidence afforded by the examination of the paper itself has satisfied me, however, that the testator had put his signature upon it before he presented it to the witnesses. Such evidence may properly be considered by the court. In *Gwillim v. Gwillim* (3 Sw. & Tr., 200 [1862]), neither of the witnesses to a will, which on its face appeared to be duly

## BUCKHOUT V. FISHER.

executed, but which was without an attestation clause, could say that he saw the testator's signature. The court, nevertheless, deemed itself at liberty to judge, from the circumstances of the case, whether or not it was probable that the testator's name was upon the will at the time of the attestation.

To the same effect see, also, in *Goods of Huckvale* (*L. R.*, 1 *P. & D.*, 375 [1867]), where the attesting witnesses were unable to say whether the testator's signature was or was not on the paper when they subscribed their names, and there was no positive testimony from any source upon that subject. The court (WILDE, J.), after reviewing *Gwillim v. Gwillim*, *Cooper v. Bockett* (*supra*), and other cases, said: "The result is that, where there is no direct evidence on the point one way or the other, but a paper is produced to the witnesses and they are asked to witness it as a will, the court may, independently of any positive evidence, investigate the circumstances of the case, and may form its own opinion from those circumstances and from the appearance of the document itself, whether the name of the testator was or was not upon it at the time of the attestation; and if it arrives at the conclusion that it was there at the time, the case falls within the principle of the decisions to which I have referred, and the execution is good. Applying that rule to this case, I have no doubt whatever that the testatrix's signature was there at the time of the attestation. The circumstances that the will is holograph, and that the attestation clause is holograph, and is full and complete,

show that the testatrix knew what was required to make a good execution."

There is the closest possible similarity between the present case and *In the Goods of Pearn* (*L. R.*, 1 *P. D.*, 70 [1875]). Pearn, with his own hand, wrote a will, which contained this attestation clause: "signed, published and declared by the said Thomas Pearn, the testator, as and for his last will and testament," etc. At the time of the execution, the deceased declared the paper to be his will in the presence of the two attesting witnesses, and asked them to witness it; but he did not himself sign it in their presence, and there was no evidence that they saw his signature. HANNEN, J., held that he was at liberty to judge, from the circumstances, whether the name of the testator was on the will at the time of execution, and if he was satisfied that it was, to decree probate.

In 1875, was decided *Matter of Janaway* (44 *L. J.*, *N. S.*, *P. & M.*, 6). It was a case in which the attesting witnesses, at the request of a testatrix, subscribed their names to a paper produced by her as her will. They did not see the signature of the testatrix, but the court found that that signature was present when the witnesses signed, and so found upon the evidence afforded by the paper itself that it was all written at one time.

I am satisfied, upon inspection of the paper here propounded, that its entire contents, except the names of the witnesses and the date that appears opposite those names was written by the decedent himself at one time. The date of November 24th, 1876, appears upon the paper in three instances:



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GOVE V. HARRIS.

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First, at its very threshold ; second, in the testimony clause ; and third, in the clause of attestation. There is nothing in the case to repel, and there is much to support, what seems to me to be a fair inference from that fact, that the decedent prepared and signed the instrument on that day, with the intention of immediately completing its execution, but that for some reason he delayed for two years and more the fulfilment of his purpose.

Upon the whole case, therefore, I find : 1st, that when the instrument was produced by the testator to the attesting witnesses, it had been theretofore by him subscribed ; 2nd, that when so produced, his signature was open to view ; 3rd, that he requested the witnesses to become such, and declared to them that the paper was his last will ; and 4th, that these circumstances involved his virtual acknowledgment of his signature, and constituted a valid execution of the paper as his will.

I pronounce for probate.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—January, 1886.

## GOVE v. HARRIS.

*In the matter of the estate of RACHEL HARRIS,  
deceased.*

One asserting the right, under Code Civ. Pro., § 2614, as a creditor of a decedent, to present the latter's will for probate, must, where his character as such is disputed, set forth facts showing, *prima facie*, that his claim is well founded.

APPLICATION for subpoena commanding production of will, with a view to propounding same for probate. The facts are stated in the opinion.

LA ROY S. GOVE, *for the application.*

M. A. KELLOGG, *for Lewis A. Harris.*

THE SURROGATE.—The Code of Civil Procedure (§ 2614) provides that a creditor of a decedent may present a petition for the probate of a paper propounded as such decedent's will. Abigail B. Gove claims to be a creditor of this decedent, alleges that said Rachel left a last will and testament which is now in the possession of Lewis A. Harris and his counsel Melville A. Kellogg, and asks that a *subpoena duces tecum* may issue, directed to them and each of them, requiring them to produce the will before the Surrogate for probate. The attorney for Lewis A. Harris has filed an affidavit of said Harris denying that the petitioner is a creditor of the estate.

Now, I have repeatedly held, in applications by persons claiming to be creditors, for orders directing the filing of inventories or accounts, that a mere allegation that such applicants were "creditors" would entitle them to the relief asked, unless that allegation were denied, but that, in the event of such denial, the applicant should be required to set forth *facts* which if undisputed would show that his claim to be a creditor was well founded.

It seems to me the practice should be the same in a proceeding like the present. The petitioner's claim to be a creditor is here denied. Before his right to

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DERICKSON V. DERICKSON.

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further prosecute the proceeding is recognized, he must make a more definite statement of the nature of his claim by setting forth the facts upon which it is founded (*Creamer v. Waller*, 2 *Dem.*, 351).

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—January, 1886.

DERICKSON v. DERICKSON.

*In the matter of the guardianship of SUE DERICKSON and others, infants under the age of fourteen years.*

A Surrogate's court, having, by virtue of Code Civ. Pro., § 2821, authority with respect to the appointment of a general guardian, as extensive as that which might formerly have been exercised by the Chancellor, may, as a condition of awarding the custody of an infant to an applicant for letters, require the latter to permit access to his ward by such persons as the court may designate.

PETITION by Susan A. Derickson, grandmother of infants, for her appointment as their general guardian. The infants' mother, Kitty B. Derickson, appeared and asked for relief.

PETER MITCHELL, *for petitioner.*

WAKEMAN & LATTING, *for the mother.*

THE SURROGATE.—The grandmother of these infants, with whom they are now residing, has applied to be appointed their guardian. Their father is dead. Their mother is not herself an applicant for letters of guardianship, but opposes the appointment of the

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DERICKSON V. DERICKSON.

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grandmother, except upon the condition that she herself shall be afforded an opportunity from time to time of visiting her children. To this restriction the petitioner refuses her assent, and she disputes the authority of the Surrogate to impose any such condition upon the issuance of letters.

The power of the Court of Chancery to award the custody of an infant to one person, and to allow access to another under such limitations as it chose to impose, has been often asserted (*Macpherson on Infants*, 120, 121; *Ex parte Ralston*, 1 *R. M. Charlt.*, 119). "The court," says Schouler (*Dom. Rel.*, § 332), "will judge as to what the interests of the child require, according to the circumstances of each case, and will make orders accordingly, both as to the actual custody and as to the persons who may have access to the child."

The authority conferred upon Surrogates by § 2821 of the Code of Civil Procedure is in this regard as extensive as that which was formerly exercisable by the Chancellor. I am clear that, in a proper case, I may give direction as to access.

The petitioner's counsel claims that such direction should not here be given, because of the alleged depraved character of the children's mother. This presents an issue of fact which must go to a reference. While such reference is pending, the children may remain in charge of their grandmother.

BLANCK V. MORRISON.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—January, 1886.

BLANCK v. MORRISON.

*In the matter of the estate of AARON P. BLANCK, deceased.*

Where an infant would be entitled, but for his infancy, to letters of administration with a will annexed, the Surrogate is *required*, by Code Civ. Pro., § 2643, and 2 R. S., 75, § 83, to grant the same to his guardian, unless rendered incompetent by reason of the existence of facts specified in the statutes as a ground of disqualification.

PETITION by Emma Morrison, daughter of decedent, and guardian of her infant children, for letters of administration, with decedent's will annexed; opposed by Elizabeth Blanck, decedent's widow.

JOHN FENNEL, *for widow.*

M. A. RAYMOND, *for daughter.*

THE SURROGATE.—This testator died in 1873, leaving him surviving his widow Elizabeth and his son Aaron. To the former he gave by his will the rents, interest, etc., of all his estate, real and personal, subject to certain qualifications not necessary to be here indicated. He provided that, in case she should remarry, the estate should be converted into money, whereof she should receive one third and his son two thirds; in case she should remain his widow during her life, he directed that, upon her death, the residue of the estate should go to his son Aaron, if living, and if not, to such of Aaron's lawful children as might be then alive.

The testator's widow is now seventy-three years of age. His son Aaron lately died, leaving him surviving his wife Emma (since married, and now Mrs. Morrison) and two children, minors then and still, of whom their mother is guardian. As such guardian, she asks to be appointed administratrix, *c. t. a.*, of this estate, which, because of the death of one of the executors and the resignation of the other, is now without any legal representative.

The testator's widow has herself renounced any claim to letters, but she opposes Mrs. Morrison's application upon grounds which would strongly appeal to my discretion if I were at liberty to exercise it. It has been repeatedly held, however, by our courts that letters of administration must be granted to an applicant who is preferentially entitled under the statute, unless he is disqualified for some cause that the statute specifies (*O'Brien v. Neubert*, 3 *Dem.*, 156; *Coope v. Lowerre*, 1 *Barb. Ch.*, 45; *McMahon v. Harrison*, 6 *N. Y.*, 443; *McGregor v. McGregor*, 1 *Keyes*, 133; *Emerson v. Bowers*, 14 *N. Y.*, 449). In the case at bar, Mrs. Morrison, as guardian of her children—who are legatees under their grandfather's will—is clearly entitled to letters.

It is provided by § 2643 of the Code of Civil Procedure that, upon due application, the Surrogate “*must*” grant administration as follows: 1st, to one or more of the residuary legatees; and 2nd, to one or more of the principal or specific legatees “who are qualified to act as administrators.”

By R. S., part 2, ch. 6, tit. 2, § 33 (3 Banks, 7th ed., 2291), it is declared that “if any person who

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PHILLIPS V. LOCKWOOD.

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would otherwise be entitled to letters of administration with the will annexed, as residuary or specific legatee, shall be a minor, such letters shall be granted to his guardian, being in all respects competent, in preference to creditors or other persons.”

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—January, 1886.

PHILLIPS v. LOCKWOOD.

*In the matter of the guardianship of the property of  
CARRIE L. PHILLIPS, an infant.*

The temporary general guardian of an infant's property, on retiring from office at the instance of his ward, who, having arrived at the age of fourteen years, petitions for the appointment of another in his place, is entitled to commissions upon the entire principal of the estate handed over to his successor.

Matter of Kellogg, 7 Paige, 265—distinguished.

JUDICIAL settlement of the account of John E. Lockwood, as general guardian of property of infant. The facts appear sufficiently in the opinion.

FETTRECH, SILKMAN & SEYBEL, *for guardian.*

OLIVER W. BEAL, *for ward.*

THE SURROGATE.—The guardian who is here accounting claims that he is entitled to full commissions, both on the principal of his ward's estate, now about to be surrendered to his successor, and upon the income received and paid out.

This claim seems to me to be just. He is retiring from his office, not because he wishes to surrender, but at the express instance of his ward, who is now more than fourteen years of age, is a married woman, and has asked that her husband be appointed her guardian in place of this accounting party.

It was held, in *Matter of De Peyster* (4 *Sandf. Ch.*, 511), that a testamentary trustee, on his being discharged from his trust and transferring the property in his hands to his successor, was entitled to commissions on the capital of the estate, consisting of stocks, bonds and mortgages, although the same had come to him from his predecessor, and had not been invested or converted by him; it was also held that he was entitled to commissions on the real estate which his predecessor had bid in on the foreclosure of mortgages; the same being in equity personalty, so far as the trust estate was concerned.

The trustee who, in *Matter of Jones* (4 *Sandf. Ch.*, 616), was denied commissions on the capital of his trust resigned voluntarily, for the mere reason that he wished to be relieved. This, also, was the case in *Matter of Allen* (29 *Hun*, 7).

*Matter of Kellogg* (7 *Paige*, 265) is cited by the petitioner in opposition to the claim of the retiring guardian. It was there declared by the Chancellor that an investment by a guardian of the funds of his ward, upon bond and mortgage, was not such a paying out as entitled the guardian to commissions. That case, however, was one of a periodical accounting during the continuance of the trust, and thus differed essentially from the present proceeding, which is to



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EGAN v. PEASE.

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terminate in the final judicial settlement of the account, and the turning over of the entire fund to the new guardian.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—January, 1886.

EGAN v. PEASE.

*In the matter of the probate of the will of CLARA E. PEASE, deceased.*

A will admitted to probate upon the testimony of one of three subscribing witnesses, and against that of the others swearing positively that there was no publication.

APPLICATION for the probate of decedent's will, made by Charles G. Pease, her husband; opposed by her mother Clara M. Egan, and her brother.

JONAS H. GOODMAN, *for proponent.*

FRANK F. VANDERVEER, *for contestants.*

THE SURROGATE.—There are three subscribing witnesses to the paper propounded as this decedent's will, Mr. Goodman, Mr. Held and Miss Held. It is not shown, by the testimony of any of these witnesses except the first, that, at the time of execution, the decedent declared the paper to be her will. Both the others swear with considerable positiveness that

the decedent made no such declaration in their presence, and that they were not at the time aware of the fact that the instrument which they subscribed purported to be a will.

Mr. Goodman, on the other hand, declares that when his fellow attesting witnesses had come, upon a summons for that purpose, into the presence of Mrs. Pease, he informed them in her hearing that they had been brought there to witness her will; he says further that the attestation clause, which is full and complete, was then and there read aloud by him in the presence of the decedent and the subscribing witnesses, and yet again he states that he expressly asked the decedent whether she acknowledged the paper to be her last will and testament, and received from her the answer "yes;" and that, when such question and such reply were uttered, Mr. Held and Miss Held were both standing at decedent's bedside. Now if Mr. Goodman's version of what occurred at the execution of this paper is to be taken as correct, the paper is entitled to probate.

Assuming that each of the three witnesses honestly endeavored to disclose the exact facts as he recalled them, which of the three is most likely to have been accurate in his recollection?

The learned Judge who pronounced the opinion of the Court of Appeals in *Orser v. Orser* (24 *N. Y.*, 51), in discussing the evidential weight of a certificate of attestation signed by a deceased subscribing witness to a will, said: "The force of this evidence will depend very much upon the circumstances of the case. If the witness, whose signature is thus proved,

is shown to be an uneducated man, not accustomed to subscribe wills, and ignorant of the legal requisites to their due execution, the evidence, afforded by proof of his handwriting, of a strict compliance with the requirements of the statute would be very slight. On the contrary, if the witness was in the habit of drawing and attending to the execution of wills and familiar with the law upon the subject, his certificate that the requisite formalities were duly observed would be entitled to great weight."

Similar comments have been made in many other decided cases where the relative value of the conflicting testimony of witnesses has been the subject of consideration. See *Matter of Kellum* (52 *N. Y.*, 517); *Morris v. Porter* (52 *How. Pr.*, 1); *Weir v. Fitzgerald* (2 *Bradf.*, 42, 71); *Williamson v. Williamson* (2 *Redf.*, 449); *Neiheisel v. Toerge* (4 *Redf.*, 328).

In the case at bar, the witness Goodman, whose testimony if credited will carry this will to probate, is an attorney at law. He states that he drew the instrument in the presence of Mrs. Pease, and pursuant to oral instructions received from her on the very day of execution, and that he then and there wrote out the attestation clause, which recites a compliance with all the requirements of the statute. That he must have had those requirements in mind, therefore, a few hours before the execution is manifest, and it is very unlikely that, when he undertook to superintend such execution, he should have forgotten any of them, or should have failed to take heed that they were all observed. It is far more probable, on

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BROWNE V. BEDFORD.

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the other hand, that his fellow witnesses, neither of whom is shown to have known the essential elements of a valid execution or to have had any special interest in the transaction wherein they were taking part, should have given an erroneous version of what that transaction was.

I find no sufficient ground in the evidence for distrusting the good faith of the draftsman of this paper, or his candor as a witness. I must, therefore, credit his testimony, and pronounce for probate.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—January, 1886.

## BROWNE v. BEDFORD.\*

*In the matter of the judicial settlement of the account of CAROLINE T. BEDFORD, as administratrix of the estate of HENRY A. BEDFORD, deceased.*

A Surrogate's court has jurisdiction to entertain and adjust a claim for past maintenance of an infant.

An infant whose father is dead, and has an estate of his own, may be maintained out of the same, by the custodian thereof, without previous judicial authorization; and on a subsequent application to the court by the latter for credit in such behalf, his expenditures, if shown to be reasonable, will be allowed, even to the utter exhaustion of the principal.

Decedent died intestate in 1865, leaving, him surviving, a widow and two infant children, and an estate which consisted exclusively of an interest in a partnership with a brother of his wife. Immediately after the death, the widow, though not yet appointed administratrix, arranged with the surviving partner for the retention in the business of decedent's share, the same to draw interest upon an agreed valuation,

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BROWNE V. BEDFORD.

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and the principal to be paid as soon as practicable. These terms were carried out by the partner, by the payment of interest, and, from time to time, instalments of the principal, until he became insolvent in 1874, in which year the widow took out letters of administration. The son resided with and was supported by the mother eleven years, until his death, and the daughter was in like manner provided for during sixteen years succeeding decedent's death. Upon an accounting had at the instance of the daughter, it was insisted, in her behalf, that respondent, by reason of having left decedent's interest in the partnership in the hands of her brother, and delayed to enforce the claim of the estate against him, should be charged with the value thereof; also, that, not having been appointed guardian, she should not be allowed credit for any sums expended for the children's benefit.—

*Held*, that, respondent's course in regard to the partnership assets appearing to have been performed in the exercise of a prudent discretion, the same should not be condemned as illegal; and, it being shown that a moderate allowance for the maintenance of the daughter from 1865 to 1880 would have absorbed the latter's entire interest in the estate, respondent was not chargeable with any balance of indebtedness.

HEARING of exceptions to report of referee to whom were referred the account, and objections thereto, of the administratrix of decedent's estate, in proceedings for judicial settlement.

H. G. BATCHELLER, *for Mrs. Browne.*

B. G. HITCHINGS, *for surety.*

WM. F. SCOTT, *for administratrix.*

THE SURROGATE.—When this decedent died, in April, 1865, he was engaged in the jewelry business in this city, in partnership with his wife's brother, Franklyn Horton. He left no estate, or substantially none except his interest in that business—an interest then valued at \$7,849.26. He left him surviving his widow, and two children—one a boy five years of age, the other a girl of three. Immediately after his death, the widow (not being at that time administratrix) ar-

ranged with her brother, Mr. Horton, that he should retain for a time the interest of the estate in the business of the copartnership, allow her annually while it was so retained, 10 per cent. upon the valuation above stated, and pay her the principal sum as soon as practicable.

The decedent's son survived him eleven years, and died at the age of 16; the daughter is still living, and became of age in 1883. Throughout his life the son resided with his mother. The daughter dwelt with her almost uninterruptedly for the first sixteen years after the father's death. Mrs. Bedford applied for and received letters of administration in 1874, but neither she nor any other person was ever appointed guardian of the children. In September, 1883, her daughter (since married and known as Mrs. Browne) procured from the Surrogate an order directing the administratrix to account. An account was thereafter filed, to which Mrs. Browne interposed objections. The issues thus raised were sent to a referee selected by the consent of counsel for both parties.

The referee found, as the result of a brief trial which ensued before him, that the administratrix was chargeable with the value of all the property left at her husband's death in the hands of his surviving partner, together with interest thereon, and that by way of credit she was entitled to nothing whatever. To this report the administratrix filed no exceptions. In course of time a decree was entered in accordance therewith, whereby she was directed, among other things, to pay to her daughter, Mrs. Browné, as her distributive share of this estate, the sum of \$4,778.01.

The administratrix failing to make this payment, an action was commenced against one of the sureties upon her official bond. Counsel for this surety then applied to the Surrogate for an order opening the decree before mentioned and permitting the surety to dispute the liability of his principal for the sums wherein she was by such decree held chargeable, or for any sum whatsoever. The decree was opened, and the account and objections thereto were submitted to another referee, the second order of reference providing that the surety might appear in the proceeding and act therein for his own protection as he should be advised.

At the new hearing several hundred pages of testimony were taken, upon which the referee found, among other things, that there was received from Horton by the administratrix \$8,987.56, and that with that she should be charged, but that she should be credited with a like sum expended by her in supporting herself and her two children between April, 1865, and December, 1876, and herself and daughter from the last named date until April, 1880.

To the findings of the referee there were taken on behalf of the contestant numerous exceptions, which are specially passed upon in a memorandum filed herewith. Her counsel insists that the conclusions reached by the former referee were sound, and ought now to be approved by the Surrogate; that the administratrix should not have left in her brother's hands her husband's interest in the copartnership; that, having been guilty of this fault originally, she should not have delayed from year to year the en-

forcement of the claim of the estate, and that for this negligence and misconduct she should be charged with the original value of that claim, and with interest thereon from a year after decedent's death. He insists also that, as she was never appointed guardian of her children, she should be disallowed any credit for sums expended by her for their benefit, and especially for sums so expended before she received letters as administratrix, and while she was appropriating and expending the assets of the estate without lawful authority.

I cannot hold her to such strict accountability. I think that she and her sureties should be treated precisely as if she had been acting, ever since her husband's death, under letters of administration. Now, if she had, in fact, been administratrix at the outset, it is by no means clear to me that, as regards the interests of the estate in the copartnership business, she could have taken any more prudent course than that which was actually pursued. It is not shown that Horton had either the means or the inclination to purchase that interest for ready cash at the \$7,849.26 valuation. And I see no reason to doubt that a summary winding up of the business and a summary sale of the stock on hand would have resulted, as Horton says it would have been likely to result, in a great sacrifice of values.

The situation was one in which Mrs. Bedford was called upon to exercise a somewhat delicate and difficult discretion. It seemed best to her, under all the circumstances, to leave the interests of the estate in Horton's hands, and to give him time to discharge his



## BROWNE V. BEDFORD.

indebtedness. For this forbearance he paid her ten per cent. annually on the total amount of that indebtedness, down to February 1st, 1872, and seven per cent. thenceforward until February 1st, 1874—such payments amounting in all to \$4,758.89. In addition to this sum, he also paid her \$2,632.86 of the principal, or about one third of the original value of her husband's interest. He subsequently became embarrassed, and, in 1874, compromised with his creditors at twenty-five cents on the dollar, reserving the right to meet in full his liabilities to this estate; and those liabilities he subsequently did meet to the extent of about \$1,500. In 1874 he was robbed of more than \$5,000 worth of property. In 1876 all the stock in his jewelry store was stolen. He has ever since been insolvent.

Now, I cannot find upon this evidence that there was any period at which the administratrix, by undertaking to enforce her claim against Horton, could have reasonably expected to secure, or could, in fact, have secured any better results for the estate than were obtained by the course she saw fit to adopt; nor do I find that that course should be condemned as illegal. I hold her accountable, therefore, for such sums as actually came to her hands, and for such sums only (In re Scott, 1 *Redf.*, 234; Chouteau v. Suydam, 21 *N. Y.*, 179; Berrien's estate, 16 *Abb. Pr.*, *N. S.*, 23; Thompson v. Brown, 4 *Johns. Ch.*, 620; Shepard v. Saltus, 4 *Redf.*, 232; Matter of Gray, 27 *Hun*, 455; Matter of Weston, 91 *N. Y.*, 502; Pomeroy's Eq. Jur., § 1070).

I sustain the findings of the referee to the effect

that the administratrix is entitled to be credited with the moneys expended for the support and maintenance of the children, and I find that she did, in fact, apply for that purpose the entire interest of her son and daughter in the sums paid her by Horton.

That the Surrogate has jurisdiction to allow credit for past maintenance cannot be doubted since the decision of the Court of Appeals in *Hyland v. Baxter*, 98 *N. Y.*, 610). Said ANDREWS, J., pronouncing the opinion of the court in that case: "There seems to be no good reason arising out of the nature of the question, or the constitution of the tribunal, which should deprive a Surrogate, upon the settlement of the account of an administrator, where advances have been made for maintenance, to determine, upon equitable principles, a claim for an allowance. On the contrary, it would seem to be a very proper place and time to have the question determined, thereby saving expense and preventing further litigation. It is true that an administrator, in making advances, acts without authority and at his peril, but this is true in every case where a parent, or one in *loco parentis*, or a trustee, or a guardian, makes advances not previously sanctioned by the court, and comes to the court for relief. The fact that the question is an equitable one, and depends on equitable principles, is not a ground of objection to the jurisdiction."

Now it is a settled doctrine in equity that where an infant, whose father is dead, has an estate of his own, he may be maintained out of such estate by the person in whose hands it lies, and that where such person, even without previous sanction of the court, has

applied property of the infant for such maintenance, he will, if his expenditures have been reasonable and proper, be exonerated from any liability therefor.

For such sums, therefore, as would have been allowed to the administratrix for the support of her children, in case she had made application therefor in advance, she may properly be credited now (*Hyland v. Baxter, supra*; *Matter of Kane*, 2 *Barb. Ch.*, 375; *Matter of Burke*, 4 *Sandf. Ch.*, 617; *Ex parte Petre*, 7 *Ves.*, 403; *Wilkes v. Rogers*, 7 *Johns.*, 566, at 581; *Willson v. Willson*, 2 *Dem.*, 462; *Voessing v. Voessing*, 4 *Redf.*, 360; *Mowbry v. Mowbry*, 64 *Ill.*, 383; *Bruin v. Knott*, 9 *Jur.*, 979; *Gladding v. Follett*, 2 *Dem.*, 58; *Osborne v. Van Horn*, 2 *Fla.*, 360; *Newport v. Cook*, 2 *Ashm.*, 332; *Matter of Bostwick*, 4 *Johns. Ch.*, 100; *Beardsley v. Hotchkiss*, 96 *N. Y.*, 201; *In re Roper's Trusts*, *L. R.*, 11 *Ch. Div.*, 272).

Under all the circumstances disclosed by the evidence, the allowance to the administratrix should not be limited to income. The rule, that the principal of an infant's estate should not ordinarily be encroached upon for his support, is not inflexible. On the contrary, if the estate is so small that the income is insufficient, resort may be had to the principal (*Barlow v. Grant*, 1 *Vern.*, 255; *Bridge v. Brown*, 2 *You. & C. C.*, 181; *Ex parte Green*, 1 *Jac. & W.*, 253; *Osborne v. Van Horn, supra*; *Newport v. Cook, supra*; *Matter of Bostwick, supra*).

If, from time to time, Mrs. Bedford, in her struggle to maintain herself and her children, had asked leave to resort to the funds in her hands in which they were interested, I cannot doubt that, prior to April, 1880,

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LYNCH V. LORETTA.

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Mrs. Browne's share in this estate would have been wholly consumed—both that part to which she became directly entitled upon her father's death and that portion of her brother's share which became hers eleven years later.

An average of \$400 per year would, in my judgment, have been a moderate allowance to the mother between 1865 and 1880, and the portion of that allowance fairly chargeable to the daughter's share would have been equal to the daughter's entire interest in the estate.

The evidence shows that the administratrix was obliged to supplement with her own earnings the funds obtained from Horton for the support and maintenance of her family, and that she is now without means. I hold that she is not chargeable with any balance of indebtedness whatever.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—January, 1886.

LYNCH v. LORETTA.

*In the matter of the probate of the will of MARGARET LYNCH, deceased.*

A member of a religious order who, as such, has taken the vow of poverty, is legally competent to receive a bequest, and hold and dispose of the same for his individual benefit.

Decedent, who left her surviving a mother, brothers and sisters, during

## LYNCH V. LORETTA.

her last illness, which occurred at a charitable institution in charge of a religious community incorporated under L. 1848, ch. 319, gave, by a bequest, absolute upon its face, to a member of that community, the bulk of her property. It was contended that the gift must be deemed to have been made in trust for the society, and was void under the statute cited, so far as it exceeded one half of the entire value of the estate; though the evidence failed to disclose the avowal of a purpose, or even a desire, on the part of testatrix, that the provision should enure to the benefit of the society.—

*Held*, that the bequest was valid, and the legatee took absolutely.

*Matter of O'Hara*, 95 N. Y., 403—distinguished.

CONSTRUCTION of will upon its admission to probate.  
The facts appear in the opinion.

B. C. WETMORE, and F. W. HINRICHS, *for contestants*.

THORNTON, EARLE & KIENDL, *for executor, proponent*.

THE SURROGATE.—The paper, whose claim to probate is here to be determined, purports to be the last will and testament of Margaret Lynch. If it be valid, then, by virtue of its provisions, Father Mahere, of St. Vincent Ferrer church, will receive a legacy of \$100, a legacy of \$8,000 will be paid to Mother Mary Loretta, of the House of the Good Shepherd, in the city of Brooklyn, and the remainder of the estate, amounting to \$2,000 or \$3,000, will pass in equal shares to James Lynch and John Lynch, decedent's brothers. These brothers are among her next of kin, and are entitled, as such, to share in her estate, in case she shall be discovered to have died intestate; so also is another brother, and so are her mother and her two sisters. The brothers and sisters are united in opposing probate.

The paper which has given rise to this controversy was signed and published by the decedent, and duly

attested by subscribing witnesses, in premises occupied by a corporation styled "The House of the Good Shepherd, in Brooklyn, N. Y." To that institution the decedent was admitted in August, 1883, about a week previous to the day when this instrument was executed.

She was received partly at her own request, and partly at the solicitation of some of her nearest relatives. She did not become a member of the religious community in charge of the house, nor was she, during her stay, subject in any wise to the rules and regulations of such community; nor did she take upon herself any of the vows to whose observance its members had bound themselves. She was simply allowed to dwell in the premises as a lodger, and was free to depart therefrom at her own will and pleasure. She had been estranged from her family, and was suffering from illness, and, doubtless, sought the shelter of the convent for comfort, quiet and repose. Twice before she had been an inmate of this House of the Good Shepherd. On the latter of these two occasions, she had remained for a period of five months, which had expired about one year before her final return, in August, 1883.

The opposition to the probate of the paper claimed to be her will, is based upon two grounds, viz.: lack of mental capacity to make and execute it, and submission to undue influence in the selection of its beneficiaries. At the time of its execution Margaret was about thirty-three years old. She had, from her youth, exhibited a wilful and wayward disposition, and, at the age of twenty-seven, had manifested indications

of insanity. Upon a certificate of Commissioners in Lunacy, she had been for a time detained in an asylum for the harmless insane on Blackwell's Island.

In spite of this fact, however, and of evidence respecting certain eccentricities of conduct in the later years of her life, I am satisfied that, at the time of the execution of this instrument, she was possessed of sufficient capacity to make a will.

I find, also, that her testamentary dispositions were not obtained by fraud, coercion, restraint or any sort of illegal influence. In view of her character, her illness and her surroundings at the time this disputed paper came into being, and in view of the liberality of its provisions for Mother Loretta, the court has felt bound to scrutinize jealously all the evidence relating to its preparation and execution. But whatever grounds of suspicion may exist in the circumstances to which I have referred are fully repelled by abundant proof that the paper expresses the intelligent, voluntary and deliberate purpose of the testatrix; for

*First.* There is no evidence that the idea of making a will was first suggested to this decedent by any person connected with or interested in the institution under whose roof she was sheltered;

*Second.* There is no evidence that the decedent's selection of Mother Loretta as a principal legatee was due to the persuasions or suggestions of any person in the House of the Good Shepherd or out of it;

*Third.* The attorney who drafted the disputed paper and superintended its execution was not employed for those purposes at the instance of any

inmate of that institution, but when he visited the premises to confer with the decedent, he did so at the request of her brother James ;

*Fourth.* This attorney received his instructions directly from the decedent herself, and those instructions were clear and explicit. When they had been embodied in the paper before me, that paper was read to and by the decedent, and was formally declared by her to be her will.

*Fifth.* The relations between the decedent and her family sufficiently explain why a person of such temper and disposition as she evidently possessed, might, without prompting, have seen fit to exclude them from sharing or from largely sharing in her posthumous estate.

The paper propounded may go to probate.

The contestants have put in issue, under § 2624 of the Code of Civil Procedure, the validity of the bequest to Mother Mary Loretta. They ask that the Surrogate, if the will is pronounced valid, shall declare whether or not that particular legacy is legal and effectual. They insist that it was given by the decedent, and must be received by the legatee, if received at all, in trust for the House of the Good Shepherd. That institution is a benevolent corporation, organized under chapter 319 of the Laws of 1848 ; and as the bequest in question disposes of more than one half of the property left by the decedent, the contestants claim that as to such excess the disposition is made invalid by chapter 360 of the Laws of 1860.

It seems to be suggested by counsel who opposes



## LYNCH V. LORETTA.

probate—though it is not strenuously insisted upon by him—that the legatee, Mother Mary Loretta, is incompetent to take property by will because of the fact that she is a member of a religious order or community, and as such has taken the vow of poverty. The doctrine by which a monk or nun was at one time regarded as civilly dead, and as incapable of acquiring any goods or estate after his or her profession, has not obtained in England since the reformation, and seems never to have been part of the law of this country. Such a person is as free as any other to hold property and to dispose of it. Any suggestion to the contrary was characterized by ROMILLY, M. R., in *Metcalf's Will* (*L. J., N. S., 33 Eq., 308*), “as sheer and absurd nonsense.”

The point seriously pressed by the contestants is that, under all the circumstances here appearing, the bequest must be deemed to have been given in trust for the benefit of the institution with which the nominal legatee is connected.

The fact that Mother Loretta is a member of the community in control of the House of the Good Shepherd, manifestly does not of itself furnish sufficient ground for holding that a bequest given to her individually was given for the benefit of that community, or for any other purpose than her individual use and enjoyment. And careful examination of all the evidence has failed to satisfy me that the legacy was given by the decedent, or was received by the beneficiary upon any trust, express or implied, for the benefit of the institution with which the latter is associated.

## LYNCH V. LORETTA.

No such trust has been created, unless the testatrix intended the legacy to be for the benefit of such institution, unless in some way she communicated such intention to the nominal legatees, and unless also such legatee, by express words or deeds, or by silent acquiescence consented to carry out the testatrix's wishes (*Adlington v. Cann*, 3 *Atk.*, 152 [1744]; *Lomax v. Ripley*, 3 *Sm. & G.*, 48 [1854]; *Wallgrave v. Tebbs*, 2 *Kay & J.*, 313 [1855]; *Tee v. Ferris*, *id.*, 357 [1855]; *Moss v. Cooper*, 1 *Johns. & Hem.*, 352 [1861]; *Jones v. Badley*, *L. R.*, 3 *Eq.*, 635 [1867]; *McCormick v. Grogan*, *L. R.*, 4 *H. L.*, 82 [1869]; *Schultz's Appeal*, 80 *Penn. St.*, 396 [1876]; *Rowbotham v. Dunnett*, *L. R.*, 8 *Ch. Div.*, 430 [1878]).

The recent decision of the Court of Appeals in *Matter of O'Hara* (95 *N. Y.*, 403), is not in conflict with the proposition above stated. In that case, a testatrix had undertaken by her will to give her residuary estate to three persons as joint tenants. At the time the will was executed, she wrote a letter of instructions to these legatees, explaining why she had made the bequest, and to what purposes she wished it to be applied.

In pronouncing the opinion of the court, holding that the will created an invalid trust, FINCH, J., said: "The proof is uncontradicted that the testatrix made the residuary devise and bequest in its absolute and unconditional form *in reliance upon a promise of the legatees* to apply the fund faithfully and honorably to the charitable uses dictated in the letter of instructions."

It further appears, from Judge FINCH's opinion,

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LYNCH V. LORETTA.

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that one of the legatees advised the testatrix that she could not effectually accomplish her charitable purposes except by a provision absolute in form, and whose legal effect would be to enable the nominal beneficiaries to divert the bequest to their own use; that he further advised her that she would have nothing to rely upon except the honor and the conscience of the legatees; that she thereupon answered that she was satisfied that the legatees could be trusted, and that she then wrote the letter of instructions above referred to.

It is neither declared nor intimated, in *Matter of O'Hara*, that, where a bequest is made to a person absolutely, and where no obligation, express or implied, is imposed, or attempted to be imposed, by the testator upon the legatee to apply it for any particular person or purpose, and where the legatee has neither expressly nor tacitly agreed so to apply it, the bequest must nevertheless fail to take effect as an absolute gift to such legatee, merely because it was bequeathed with the hope and expectation on the testator's part that the legatee would not use it for his own purposes, and would use it for the purposes which the testator had at heart. Such hope and expectation will never suffice of themselves to fasten upon a bequest any trust that the courts will recognize, whatever moral obligation they may seem to impose upon the legatee.

In the case at bar the legatee, whose bequest is disputed, doubtless regards herself as under a moral obligation to the community whereof she is a member to devote all property acquired by her to the uses

of that community. But the law cannot hold her to that obligation, and the probable belief of the testatrix, that the legatee might deem herself bound by it, has not engrafted a trust upon the legacy. See, in addition to the cases already cited, *Willets v. Willets* (35 *Hun*, 401); *Bowker v. Wells* (2 *How.*, *Pr.*, *N. S.*, 150).

The evidence does not show that Mother Loretta or any other person at her instance, or with her knowledge, induced or sought to induce the testatrix to make the bequest here in question. It does not show that the testatrix avowed any purpose that that bequest should inure to the benefit of the society of which Mother Loretta was a member. It does not show, indeed, that such was the desire of the testatrix, or that she knew that the legatee had taken a vow of poverty which would not only prohibit her from personal enjoyment of any bequest in her favor but would forbid her to apply such a bequest to any other uses than those prescribed by the religious order to which she belonged.

And besides, the obligation of the vow of poverty might be removed by superior authority, or the legatee might herself renounce it at any time that she saw fit. Such renunciation might necessitate her withdrawal from further association with the society, but the society could not in that event claim the bequest or call upon its recalcitrant member to account for it. Any hope or expectation that the testatrix may possibly have entertained from the supposed character of the legatee, or from her connection with the convent, that she would devote to its

## LYNCH V. LORETTA.

uses the fund bequeathed, was never, so far as the testimony discloses, made known to the legatee, nor did she, directly or indirectly, declare to the testatrix any purpose to recognize or regard any such hope or expectation.

In *Rowbotham v. Dunnett* (*supra*), cited by the Court of Appeals in the matter of *O'Hara* (*supra*), a testatrix, who had declared her intention of devising real estate to certain charities was advised by her solicitor that such a gift would be invalid. She thereupon devised the same to such solicitor and another for their personal use and benefit, without any restriction, trust or condition. Although the court avowed itself satisfied that the testatrix hoped and believed that her original purpose would be effected by the devisees, it nevertheless held that this circumstance, even though known to such devisees, did not engraft a trust upon the devise.

Upon the foregoing authorities, I hold that, in the case at bar, Mother Loretta is absolutely entitled to the bequest in her favor, and that no trust is created which the House of the Good Shepherd, if itself competent to take a bequest under this will, could enforce for its benefit, or which, because of the incompetency of such society, the contestants can now avail themselves of for their own advantage.

Let a decree be entered accordingly.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—January, 1886.

BRENNAN v. LANE.

*In the matter of the estate of JOHN BRENNAN,  
deceased.*

Neither the grant of authority, contained in Code Civ. Pro., § 2481, subd. 4, to a Surrogate, to enjoin by order an executor or administrator, to whom a citation or other process has been issued, from acting as such until further order, nor the more general clause, id., § 2472, subd. 3, permitting him "to direct and control the conduct" of such officials, justifies an interference with the right of one of two executors, etc., to control and dispose of assets without the co-operation of his associate, merely because of a disagreement between them as to the time when, or circumstances under which, the same can most advantageously be exercised.

Upon an application by the administratrix of decedent's estate for an order restraining her associate in office from continuing to carry on the business in which decedent had been engaged during his lifetime, she alleging that the management of the business had been profitable to the estate, and that an early sale of the property therein employed was unadvisable,—

*Held*, that the court ought not to interfere, but should leave those to whom the law had committed the estate to decide in their discretion what course to pursue, subject to the liability to be adjudged upon a settlement of their account.

The authorities defining the power of the courts to control the conduct of executors and other trustees in exercising the functions of their office—reviewed.

APPLICATION by Mary Jane Brennan, administratrix of decedent's estate, for an order restraining William Lane, her associate in the administration, from selling certain assets. The facts are stated in the opinion.

W. A. KEELER, *for administratrix.*

A. COHEN, *for administrator.*

**THE SURROGATE.**—The administratrix of this decedent's estate asks for an order restraining the administrator, who is associated with her in its management, from selling certain property belonging thereto. She alleges, in her moving affidavit, that she has continued since the decedent's death, to carry on the livery stable business which he conducted in his lifetime, at No. 164 Division street, in this city; that her management of that business has been profitable to the estate; that she is informed and believes that it is the purpose of the respondent to make early sale of the horses, carriages and other property used in such business; that such sale would at this season of the year be inadvisable and ought, for the best interests of the estate, be postponed until April next.

The administrator alleges in reply that he is acquainted with the value of horses, carriages, harness, etc.; that this estate is insolvent; that it is indebted to the firm of which he is a member in the sum of \$4,200; that he is unwilling that the assets for which he is liable should be longer at the risk of the business carried on by the administratrix, and that for reasons specified by him a sale thereof should be effected at once. He declares that his views are shared by the sureties on the administration bond, and has filed their affidavits in support of his assertion. Answering affidavits have been presented in behalf of the administratrix.

Now, under these circumstances, has the Surrogate jurisdiction to grant the relief for which the administratrix prays? And, if he has such jurisdiction, should that relief be granted?

*First.* The only statutory provision which expressly authorizes the Surrogate to restrain an executor or administrator from exercising the functions of his office is subd. 4 of § 2481 of the Code of Civil Procedure. It is there declared that a Surrogate may “enjoin by order an executor, administrator, etc., *to whom a citation or other process has been duly issued* from acting as such until the further order of the court.” This grant of authority is manifestly not broad enough to warrant the issuance of such an order as is here sought.

Counsel for the administratrix invokes in her behalf the jurisdiction with which this court is vested by § 2472. That section provides (subd. 3) that the Surrogate may “*direct and control the conduct of executors, administrators and testamentary trustees.*” This power of direction and control is limited by the concluding words of the section, which declares that it “must be exercised in the cases and in the manner prescribed by statute.”

A similar limitation was placed upon the Surrogate's authority by the statute which was in operation before the Code was enacted (R. S., part 3, ch. 2, tit. 1, § 1; 3 Banks, 6th ed., 325). The meaning of this expression, “to direct and control the conduct . . . . of executors and administrators,” as used in the statute just cited, has been on several occasions the subject of judicial determination.

In 1845, Chancellor WALWORTH held, in *Matter of Parker* (1 Barb. Ch., 154), that the power conferred by the words in question would not warrant the Surrogate in restraining an executor from disputing in a



court of law the liability of his testator's estate upon such testator's promissory note, or from prosecuting a bill of discovery for ascertaining the consideration upon which such note was based.

"It is difficult," said the Chancellor, in the case just cited, "to say *what* direction and control over executors and administrators was intended to be given, . . . . but it is hardly to be presumed that the legislature intended to confer such a power as is claimed in this case. . . . . The only course is to leave it to the executor under his oath of office faithfully and honestly to discharge his duty, . . . . and if he violates that duty, he should not be allowed in his accounts the loss which the estate sustains."

Bliss v. Sheldon (7 *Barb.*, 152 [1849]) was an appeal from a Surrogate's order requiring certain executors, who had filed an inventory, but had neglected to set off any part of the property to their testator's widow as articles exempt, to pay the sum of \$150 to such widow, in lieu of what she would be entitled to receive under the exemption laws. In sustaining the order of the Surrogate, which was assailed for alleged want of jurisdiction to make it, the Supreme court said: "Under the third subdivision" (of § 1, *supra*) "the Surrogate has plenary power to control the conduct of executors and administrators. The words are general, and would seem to be directly applicable to a case in which an executor *persists in exercising the functions and discharging the duties of his trust erroneously or irregularly* ; and any person who suffers any injury by the erroneous action of the executor in his

proceedings in the Surrogate's office may lawfully call upon the Surrogate to control his conduct."

In *Seaman v. Duryea* (10 *Barb.*, 523 [1851]), the Supreme court, in construing the provision of the Revised Statutes which empowered Surrogates "to appoint guardians for minors and to direct and control their conduct," said: "The power to direct and control the conduct of guardians cannot be a barren power. . . . The authority to appoint and remove guardians, and to direct and control their conduct, given by law to a court of justice, must comprehend the power to compel them to do *whatever the law requires them to do*." In accordance with this interpretation, the court held that a Surrogate had jurisdiction to decree the time when, the person to whom, and the manner in which a superseded guardian should deliver over the property of his ward.

*Dubois v. Sands* (43 *Barb.*, 412 [1864]) was a proceeding in which a Surrogate had ordered an executor, who was directed by his testator's will to expend for the benefit of children the interest of a certain legacy, as their necessities required, to account and pay over such interest into the Surrogate's court. The Supreme court held, on appeal, that the statute which empowered a Surrogate "to direct and control the conduct of executors," etc., gave him authority to compel executors to perform what was their manifest duty under their testator's will.

*Wood v. Brown* (34 *N. Y.*, 337 [1866]) was an appeal from a Supreme court judgment in an action wherein an executor had sought to obtain an injunction against his co-executor and a revocation of his

letters on the ground of gross maladministration. It was held that, under the circumstances there appearing, the Supreme court was authorized to control the conduct of the defendant, so far as to compel him to place the assets of the estate where they would be accessible to the plaintiff, and so far, also, as to prescribe the mode in which the defendant should cooperate with his associate in discharging his duties under the will.

MORGAN, J., in the course of his opinion affirming the judgment below, declared that a Surrogate might interfere to control the conduct of an executor in case such executor refused "to perform the duties which the law casts upon him, and which are necessary to preserve the estate." "*This power,*" he added, *is not arbitrary, and can only be invoked in aid of some regular proceedings which the statute authorizes to be taken against executors and administrators.* The Surrogate cannot, for instance, prevent an executor from defending or prosecuting a suit, *nor can he interfere with an executor to control him while in the orderly discharge of his duties.*"

Burt v. Burt (41 N. Y., 46 [1869]), was a suit between two executors as to the custody of funds. The Supreme court adjudged that the defendant should place the same in the custody of a person specified, and that thereafter both the plaintiff and defendant should put all moneys received by them in a designated depository, to be drawn out only on their joint check. It was held on appeal that, in the absence of any mismanagement or misappropriation of assets, or of any misconduct likely to put in serious

jeopardy the interests of creditors or legatees, the Supreme court had no power thus to interfere between executors. WOODRUFF, J., writing for reversal (all his associates concurring), said that the case of *Wood v. Brown* (*supra*) could only be upheld on the ground that the executor whose conduct was there subject to control, had been guilty of misconduct in office, had greatly embarrassed the administration of the estate, and had imperilled the interests of the beneficiaries under the will.

No case decided since *Burt v. Burt* has fallen under my observation which takes any broader view than is there declared, respecting the right of courts to control the conduct of executors and administrators. Even if the allegations in the affidavits of the administratrix were wholly uncontroverted, I should feel bound, therefore, to deny this application.

The general right of an executor or administrator to sell at his pleasure the personal property of his decedent's estate, in order to provide means for the payment of debts, and of legacies or distributive shares, is, of course, well settled (*Rogers v. Squires*, 26 *Hun*, 388; *Bradner v. Faulkner*, 34 *N. Y.*, 347; *Sherman v. Willett*, 42 *N. Y.*, 146).

It is equally well settled that, where an estate has two or more executors or administrators, each of them has full control of the assets, and may dispose of the same without the co-operation of his associate (*Douglas v. Satterlee*, 11 *Johns.*, 16; *Wheeler v. Wheeler*, 9 *Cow.*, 34; *Hertell v. Bogert*, 9 *Paige*, 52). The enjoyment of this right cannot be lawfully restrained by the Surrogate, merely because of a disagreement.

between executors or administrators as to the time when, or the circumstances under which such right can be most advantageously exercised.

The situation, as described in these moving papers, is eminently one in which the persons to whom the law has committed the management of this estate should be permitted to decide, according to their own discretion, what course the best interests of the estate require them to pursue. The decision of the question whether an immediate sale of the livery stable property is desirable, or whether, on the other hand, it is better to delay such sale for three months, involves the exercise of ordinary administrative functions with whose "orderly discharge," the Surrogate is powerless to interfere (*Wood v. Brown, supra*).

*Second.* Even if I had the power to grant this motion, I should not exercise it, in view of the answering affidavits. It is by no means clear that a longer continuance of the business left by the decedent would be advantageous to the persons interested in this estate. It would occasion expense and be attended with no little risk. Except under extraordinary circumstances, such as do not seem to exist in the case at bar, courts are inclined to look with disfavor upon such a course as this administratrix seems disposed to adopt.

Motion denied.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—February, 1886.

BULL v. KENDRICK.

*In the matter of the application for probate of a paper propounded as the will of HENRY C. BULL, deceased.*

In the absence of evidence to the contrary, the Surrogate assumed that the statutes of a sister state, regulating the distribution of an intestate's personal property did not differ from those of New York.

The contestants of an alleged will of decedent, who died domiciled in the state of Illinois, having asked for an *open* commission to examine certain witnesses there residing, in the probate proceeding, to which infants, not next of kin to decedent, but who had an appearance of interest under the disputed instrument, were parties,—

*Held*, that the latter must be deemed "adverse" parties, within the spirit of Code Civ. Pro., §§ 893, 895, and the request be denied.

But it being subsequently shown that, under the foreign statute, those infants would take a greater share in intestacy than would be possible if the will were admitted, an open commission was allowed to issue.

Cross applications for issuance of open commission, and commission upon written interrogatories, in a special proceeding instituted for the probate of decedent's will.

WEEKES & FORSTER, for *Edward Kendrick, executor, proponent.*

HOPPIN & TALBOT, for *Eliza Bull, and others, contestants.*

THE SURROGATE.—The proponent of an instrument lately offered for probate, as this decedent's will, prays that a commission be issued for the examination, upon written interrogatories, of its subscribing witnesses, who reside in the state of Illinois. The objectors to

the probate of the paper propounded have appeared upon this motion, and asked that, in case of the issuance of a commission, they be granted the opportunity for oral cross-examination of the witnesses. The discretionary authority to permit such a course is conferred upon certain courts of record by § 893 of the Code of Civil Procedure, and the provisions of that section are made applicable to the Surrogate's court by § 2538. It is provided, however, by § 895, that this authority shall not be exercised when "the adverse party is an infant." Now, in this proceeding for probate, four infants have been made parties. Must they be regarded as parties "adverse" to the applicants for oral cross-examination of the witnesses to be examined under a commission?

The alleged will contains this provision: "I give and bequeath to the children of my deceased brother Edward the sum of \$1,000 in equal shares *per stirpes*."

The infants, whose rights are here under consideration, are Edward Bull's grandchildren. Edward left two children him surviving, both of whom are still alive.

Now, whether the grandchildren will be entitled to share in the above quoted bequest, in case the propounded paper shall be admitted to probate, is a question that will not be here determined. They have certainly such an appearance of interest as entitles them to be made parties to the controversy. On the other hand, they have no possible interest in common with the contestants. The decedent left a brother and two sisters him surviving, and, as has been stated already, two children of his deceased brother, Edward, are yet alive.

The infants are, therefore, not decedent's next of kin, and, in case his intestacy shall be established, will have no interest in his personal estate (R. S., part 2, ch. 6, tit. 3, § 75; 3 Banks, 7th ed., 2304; *Doughty v. Stillwell*, 1 *Bradf.*, 300; *Adee v. Campbell*, 97 *N. Y.*, 52). He owned no real property within the State of New York, and it does not appear that the rights of the infants, who, as his heirs at law, may be entitled in case of his intestacy to real property, situated without the State, can be in anywise affected by the result of this proceeding for probate. It is unnecessary, therefore, to consider the interest of the infants except as regards personalty.

I think that they are "adverse parties" within § 895. The contestant's application must, therefore, be denied, and that of the proponent granted.

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The following opinion was filed, in the same matter, February 23rd, 1886:

THE SURROGATE.—The domicil of this decedent, at the time of his death, was in the state of Illinois. In my memorandum of February 1st, 1886, denying the application of these contestants for the issuance of an open commission to examine the witnesses whose testimony the proponents seek to obtain, it was assumed that the law of Illinois regarding the distribution of an intestate's personal estate did not differ from the law of New York.

I accordingly held that, as the infants who would benefit by the admission to probate of the paper propounded as this decedent's will, would be excluded



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RAYMOND V. DAYTON.

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from sharing in his estate in case probate should be denied, they are "adverse parties" to the contestants, and that, by § 895 of the Code of Civil Procedure, I was precluded from issuing an open commission. It appears, from the proof submitted upon re-argument, that the infants in question will, in case the decedent shall be found to have died intestate, be entitled to a distributive share of the estate which will exceed the amount to which they will be entitled if the will is upheld. Under these circumstances, I think that an open commission may properly be granted. An order may be entered accordingly.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—February, 1886.

RAYMOND v. DAYTON.

*In the matter of the estate of FANNY RILEY, deceased.*

An item of expenditure, in the account of an executor, representing counsel fees paid for services rendered in the course of administration, will be cut down so as to exclude remuneration for the performance, by an attorney, of any duties incumbent upon the former personally, in view of his statutory commissions.

HEARING of objection to the account of Eliza Dayton, as executrix of the will of decedent; interposed by Alice Raymond and another, residuary legatees thereunder, in proceedings for judicial settlement.

S. J. COWEN, *for executrix.*

H. M. BRIGHAM, *for objectors.*

THE SURROGATE.—To the account of this decedent's executrix a single objection has been interposed in behalf of the residuary legatees. It is claimed that the accounting party is not entitled to be credited, as she claims to be credited, for an item of \$350, disbursed by her as counsel fees in the course of her administration of the estate. The question raised by this objection has been submitted for determination upon affidavits filed by the respective parties.

The authority of this court to allow an executor or administrator to reimburse himself out of his decedent's estate for sums expended by him in its administration, is solely derived from chapter 362 of the Laws of 1863. The justice and reasonableness of such expenditures must be established to the satisfaction of the Surrogate, before such expenditures can be sanctioned as a claim against the estate. If credit is asked for moneys paid to counsel, it must be shown that the services rendered by such counsel were necessary, or seemed to be necessary, and that they merited the compensation awarded them by the representative of the estate (*St. John v. McKee*, 2 *Dem.*, 236; *Journault v. Ferris*, *id.*, 320).

Now it appears, from the affidavit of the attorney for the accounting party, that to a considerable extent the services performed by him, at the instance of the executrix, were such as the executrix herself might justly have been expected to render, and for the rendering of which a right to commissions by way of compensation is accorded by law. The assets left by the decedent consisted solely of moneys in

## RUDD V. RUDD.

savings bank, and amounted to less than \$3,000. No person has ever interposed a claim as creditor of the estate. Its administration has therefore, in the nature of things, been of a very simple character. I do not dissent in the least from the opinion of the attorney for the executrix, that the time he has devoted to her affairs would have justified him in claiming from her a compensation even larger than he has received. But as between the executrix and the legatees, I cannot find that any larger disbursement than \$175 was justly and reasonably made by her for counsel fees, and can now properly be charged against this estate. That sum I allow.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—February, 1886.

## RUDD v. RUDD.

*In the matter of the estate of GEORGE RUDD, deceased.*

For the determination of a contest between the beneficiary of a testamentary trust, claiming payment of a balance of income, and the executor, trustee, asserting a right to withhold the same and apply it upon a debt alleged to have been due from the former to testator at the time of his death,—the existence of the debt, as well as of a surplus of income, being in dispute,—the parties must resort to a tribunal other than a Surrogate's court.

Smith v. Murray, 1 Dem., 34—distinguished.

SETTLEMENT of decree, on judicial settlement of

account of Janet Rudd and others, executrices of decedent's will. The facts are stated in the opinion.

DEFOREST & WEEKS, *for executrices.*

ESTES, BARNARD & OLENDORF, *for Martin W. Rudd.*

THE SURROGATE.—A decree is about to be entered, settling the accounts of the executrices of this estate. One of the beneficiaries of a trust created by the testator's will asks that such decree shall contain a direction for the payment to him of certain income to which he claims to be entitled. Part of the income of the trust in question has already been paid by the executrices to the beneficiary. They refuse to pay the balance, claiming the right to retain the same, and to apply it on account of his alleged indebtedness to the testator at the time of the latter's death, which indebtedness, as they insist, is still undischarged. If the provision for this beneficiary were an ordinary money legacy, there would be no doubt of the right of the representatives of the estate to apply it towards discharging a debt due from the legatee to the decedent (*Smith v. Murray*, 1 *Dem.*, 34). In the case at bar, however, there is a dispute as to whether any indebtedness really exists, and besides there is now a question whether there is, over and above the amount of income properly applicable to the use of the beneficiary, any surplus which should be applied to the payment of the indebtedness. For the determination of these questions the parties interested must resort to another tribunal. They will be afforded an opportunity to do so.

Meantime, I ought not to direct the representatives of the estate to pay over the income.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SUBROGATE.—February, 1886.

BANNING v. GUNN.

*In the matter of the estate of CHARLES W. BERRY,  
deceased.*

Testator, by his will, gave all his property to the executors, in trust to apply the income to the use of his infant daughter for life; empowering them, in their discretion, to apply, if necessary for her support, *such part of the principal*, not exceeding \$500 per annum, *as they might think necessary*; with remainder of the unexpended principal over.—  
*Held*, that the court had not power to direct the trustees to use any portion of the principal for the purpose indicated, in the absence of proof that they had abused their discretion, and that their conduct had been inconsistent with an honest and faithful discharge of their duties.

UPON the judicial settlement of the account of Charles L. Gunn and another, executors of decedent's will, and trustees of a trust thereby created in favor of his infant daughter, William C. Banning, guardian of the latter, asked that certain instructions be given to the referee to whom the account had been referred; the nature of which appears by the opinion.

HILL & HUSTED, *for guardian.*

WEEKES & FORSTER, *for executors.*

THE SURROGATE.—This testator died in 1882, leaving a will whereby he appointed his brother John H. Berry and another executors and trustees of his estate, and William C. Banning the guardian of his daughter. In June last, Mr. Banning filed a petition praying—

1. That the executors and trustees be directed to account.

2. That they be directed to pay over to him, from time to time, the income of the ward's estate, and such part of the principal as might be adjudged to be necessary and proper for her support and education.

3. That he be reimbursed out of his ward's estate for expenses incurred by him as testamentary guardian, in and about her support, maintenance and education.

By the will of this testator, his entire estate is given to his executors, in trust to apply all the income to the use of his daughter Helen during her life. The will contains this further provision: "And I authorize and empower my said executors . . . . in their discretion to apply, if necessary for her support, *such part of the principal as they may think necessary*, but not exceeding \$500 in any one year." At the daughter's death, the unexpended principal of the estate is given to her issue, and if none are alive to take, then to the testator's brothers and sisters.

To the guardian's petition, the respondents have filed an answer, wherein they allege that the entire estate in their hands is of less value than \$3,000; that they have already applied for the support and maintenance of the infant a larger sum than the income thus far earned; that they do not think it necessary or prudent that any further encroachment be made upon the principal, and that they have exercised the discretionary authority conferred upon them by the testator in declining to make application of any of the remaining principal to the infant's use.

The account of the executors and trustees was filed on October 20th last. On November 10th, the guardian interposed objections. He now asks that the referee, to whom the issues of the accounting are about to be submitted, be directed to take proof and report whether any portion of the principal of the ward's estate, and if any, then what portion, is needed for her support. The respondents insist that such a direction is improper, and that under the will their discretion to apply or to refuse to apply a portion of the principal of the estate to the use of the testator's daughter is in no wise subject to control or review.

The respondent's contention is unsound. The testator has not vested them with absolute authority in the premises. They cannot exercise their powers arbitrarily or whimsically, or for the gratification of malice or spite, or in disregard of the facts and circumstances which fairly belong to a proper consideration of the matter which the testator has put in their charge. Their decision and action can be reviewed by the Surrogate to the extent, at least, of ascertaining whether they have exercised their discretion honestly and in good faith (*Mason v. Mason*, 4 *Sandf. Ch.*, 623; *Bryan v. Knickerbacker*, 1 *Barb. Ch.*, 409; *Erisman v. Directors of the Poor*, 47 *Penn. St.*, 509; *Forman v. Whitney*, 2 *Keyes*, 165; *Ireland v. Ireland*, 84 *N. Y.*, 321; *Feltham v. Turner*, 23 *Law Times*, 345). Such powers as courts of equity have been wont to exercise in this regard are now possessed also by the Surrogate (*Hyland v. Baxter*, 98 *N. Y.*, 610).

In *Ireland v. Ireland* (*supra*) it was held by the

Court of Appeals that, by virtue of its general jurisdiction over trustees, a court of equity could, upon a proper state of facts, direct how a trustee's discretion should be exercised and how the trust fund should be administered. "But when," said EARL, J., pronouncing the opinion of the court, "a trustee is acting in administering his trust within the limits of a fair and reasonable discretion, a court of equity cannot intervene except for very peculiar reasons calling for the exercise of this jurisdiction."

The authority to intervene, wherever it has been exercised by a court of equity, seems to have been referable to its general jurisdiction to prevent abuses of trust, rather than to its right to direct and control the conduct of executors and trustees.

In cases where discretionary authority, such as is conferred by the will before me, is given to persons selected by the testator himself as trustees, the Surrogate is powerless to overrule the decision of such trustees, except upon proof that they have abused their discretion, and that their conduct has been inconsistent with the honest and faithful discharge of their duties (*Costabadie v. Costabadie*, 6 *Hare*, 410; *French v. Davidson*, 3 *Madd.*, 396; *Walker v. Walker*, 5 *id.*, 424; *Collins v. Vining*, 1 *C. P. Cooper*, 472; *Morton v. Southgate*, 28 *Me.*, 41; *Hawley v. James*, 5 *Paige*, 318, at p. 485; *Littlefield v. Cole*, 33 *Me.*, 552; *Haydel v. Hurck*, 72 *Mo.*, 253; *Ames v. Scudder*, 11 *Mo. App.*, 168).

In the case at bar, the petitioner has not charged the respondents with lack of good faith. He simply claims that they have reached an erroneous conclu-



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BECKER V. LAWTON.

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sion as to the ward's necessities. I must, therefore, decline to send to a reference the question sought to be raised by the petitioner. It is of no importance to ascertain what sum is needed, in the estimation of a referee, or in the estimation of the Surrogate, for the support and maintenance of this testator's daughter. The question whether the conclusion reached by the trustees was reached in the exercise of their honest judgment will be considered, in case that question shall be properly presented.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—February, 1886.

BECKER v. LAWTON.

*In the matter of the estate of JANE MULL, deceased.*

A Surrogate's court will not revoke an executor's letters at his own request, under Code Civ. Pro., §§ 2689, 2690, upon allegations that he has interests, as surviving partner of the decedent, antagonistic to his duties as executor, necessitating resort to another tribunal, where the estate should be represented by a disinterested person,—the former court having ample power to adjust the equities of the case.

PETITION by George B. Lawton, executor of decedent's will, under Code Civ. Pro., §§ 2689, 2690, for leave to resign his trust; opposed by C. Becker, legatee.

A. J. PERRY, and WM. FULLERTON, for executor.

J. H. WHITELEGGE, for legatee.

THE SURROGATE.—Pending the litigation which has arisen respecting the correctness of the accounts filed by the executor of this estate, he applies for an order revoking his letters testamentary. He asks to be relieved from his trust, upon the ground that the question of his liability to this estate, by reason of the partnership, that existed between himself and the testatrix in her lifetime, is one upon which this court has no jurisdiction to pass, and that, in order that such question may be submitted for the determination of a competent tribunal, some person other than himself should be empowered to act as the representative of the estate.

The reasons urged in support of this petition are insufficient, and the petition must, therefore, be denied (Code Civ. Pro., § 2690). This court has ample authority to hear and determine the question of the executor's liability to the estate as surviving partner of the testatrix (*In re Saltus*, 3 *Abb. Ct. App. Dec.*, 243; *Marre v. Ginochio*, 2 *Bradf.*, 165; *Estate of Stouvenel*, *Tucker*, 241; *Woodruff v. Woodruff*, 17 *Abb. Pr.*, 165).

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ADAMS V. VAN VLECK.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—February, 1886.

ADAMS v. VAN VLECK.

*In the matter of the judicial settlement of the account of EMMA D. VAN VLECK and another, as trustees, under the will of PATRICK DICKIE, deceased.*

Executors of a will, which appoints them trustees of a trust thereby created, though not justifiable in retaining, beyond a period reasonably requisite for their conversion, securities found among testator's assets, unsuitable for trust investments, will not be directed to dispose thereof, at the instance of an objector to the account filed by them as trustees, where no damage to the estate is shown to have been caused by the retention. The aggrieved parties should apply for the removal of the accounting parties, under Code Civ. Pro., § 2817, or proceed under id., § 2815, to procure the protection of a suitable bond,

HEARING of objections interposed, in behalf of Louis B. Adams and others, infant *cestuis que trustent*, under decedent's will, to the account filed by Emma D. Van Vleck and another, as trustees under the same. The facts appear sufficiently in the opinion.

D. THURSTON, *for trustees.*

CLARK BROOKS, *for executor, etc., of Susan Dickie.*

WM. F. SCOTT, and GEO. C. HOLT, *special guardians.*

THE SURROGATE.—I overrule the objection interposed to this account by the special guardian of the Adams minors and the Lounsbery minors. They here renew the protest, interposed at the time of the accounting of these trustees, as executors, in 1883, that

certain railroad stocks and bonds held by the accounting parties are insecure and illegal investments. That the stocks and bonds referred to are not such as trustees should purchase with trust funds is entirely clear. In the case at bar, however, they were not so purchased, but were found by the executors and trustees among the assets of the estate when it came into their hands. While this fact cannot justify their retention beyond such reasonable time as may be requisite for their advantageous conversion, it seems to me that the question whether that reasonable time has or has not elapsed, is one that cannot here and now be properly determined.

It is in the power of these objectors to institute proceedings, under § 2817 of the Code of Civil Procedure, for the removal of the accounting trustees, upon the ground that, in neglecting too long to close out the investments complained of, they have improvidently managed the affairs of the estate, and are unfit for the due execution of the duties of their office. So, too, the objectors may obtain the removal of the trustees, or, as an alternative, the protection of a satisfactory bond, if in a proper proceeding they shall make manifest to the court that the circumstances of such trustees do not afford adequate security for the due administration of their trust (Code Civ. Pro., §§ 2815, 2816, 2817, 2685); but unless some such course is taken, I do not see how the objectors can obtain any practical relief, until the disfavored securities, or some of them, shall have been disposed of, and until it shall thus be made apparent whether the estate has or has not suffered loss by reason of improvident management.

I do not think that, because of the objections I am now considering, the Surrogate should institute an inquiry whether, under all the circumstances, the accounting parties have thus far acted in good faith and exercised reasonable prudence in retaining the stocks and bonds to which the objections refer, and as to whether any directions should be given to the trustees respecting the conversion of such stocks and bonds into legitimate trust investments.

It is questionable whether the Surrogate has power thus to control the conduct of trustees, and even if there were no doubt on the score of jurisdiction, trustees ought not to be thus interfered with in the exercise of their ordinary functions, except for grave causes, and when there are grounds for believing that, without such interference, the interests of the *cestuis que trustent* would be imperilled (Brennan v. Lane, *ante*, 322).

The decree to be entered on this accounting may provide that the settlement of the trustees' accounts shall not, as against the infant objectors, be taken as an adjudication of the propriety of the conduct of the trustees, in retaining in their hands the investments complained of by the special guardians.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—February, 1886.

SUSZ v. FORST.

*In the matter of the estate of CATHERINE BÜSCHING, deceased.*

Upon the return of a citation, issued in compliance with the prayer of a petition by an alleged assignee of a legatee under decedent's will,—directing the executor to show cause why he should not be removed, or compelled to give security, or required to pay to his successors or into the registry of the court all moneys and property by him received,—respondent interposed affidavits denying the existence of such a person as the legatee named in the will, and asked for a dismissal of the proceedings pursuant to Code Civ. Pro., § 2718, upon the theory that the same were instituted to enforce payment of a legacy.—

*Held*, that the petition substantially invoked the exercise of the power of the court to remove the executor from office, as permitted by Code Civ. Pro., § 2685; that it was not competent for respondent, by a total or partial denial of the moving allegations to entrench himself in office and oust the court of jurisdiction; and that the dismissal asked for should be refused.

PETITION by Phillippine Süsz, assignee of a legatee under decedent's will, for certain relief against Charles Forst, executor thereof; the nature of which appears in the opinion.

DAVID LEVY, *for petitioner.*

GEO. P. AVERY, *for executor.*

THE SURROGATE.—This decedent, by her last will and testament, made a person whom she designated as “my husband, Herman Busching,” her universal legatee. Prior to January 16th, 1885, one Leonhard Gender, who claims to be the person so designated,

assigned his interest in this legacy to one Phillippine Süsz. A proceeding (whose character and purpose I shall presently explain) was thereafter begun by such assignee, against Charles Forst, the executor of Mrs. Busching's estate. To the petition of the assignee and the affidavit in support of it, the respondent executor interposed answering affidavits. On May 25th, 1885, the Surrogate made an order submitting the issues thus raised to a referee, with instructions to take proof concerning the same, and report to the Surrogate with his opinion. On November 20th, 1885, the referee filed his report and opinion, together with the findings upon which they were based.

Counsel for the executor has lately moved for an order confirming certain findings in such report contained, and dismissing this proceeding, upon the ground of the Surrogate's lack of jurisdiction to entertain it. At the argument upon his motion, he represented that the proceeding had been instituted, under § 2717 of the Code of Civil Procedure, for a decree directing the payment of the legacy in question to the petitioner, and he claimed that, under § 2718, the interposition of the respondent's answer had the effect of ousting the Surrogate of jurisdiction in the premises. The referee seems to share, in this respect, the notion of counsel for the executor.

Both of these gentlemen mistake the real character of the proceeding before the court. This respondent has appeared in response to a citation ordering him to show cause why he should not be removed as executor, or compelled to give security for the faithful discharge of his duties, or required to pay to his succes-

sors in office, or into the registry of the court, all moneys and property by him received as such executor. The prayer of the petition upon which the citation is founded, is in substantial correspondence with the citation itself.

Now, although this petition is somewhat inartificial in form, its presentation to the Surrogate, and the issue of citation thereon, must be treated as the commencement of a proceeding under § 2685 of the Code, for the removal of the executor, and for the revocation of his testamentary letters upon certain grounds in the petition specified. The proceeding can with no greater propriety be regarded as one for procuring the payment of a legacy under § 2717 than as one for the appointment of a temporary administrator under § 2668. The provisions of § 2718, which declare the effect of a verified answer denying the validity of a claim whose payment the Surrogate is asked to direct, have, therefore, no application whatever to the present citation, nor have the decisions of the Court of Appeals in *Hurlburt v. Durant* (88 *N. Y.*, 121) and in *Fiester v. Shepard* (92 *N. Y.*, 251).

Who has the right to institute a proceeding for the removal of an executor and the revocation of his letters testamentary? "A creditor or person interested in the estate," says § 2685 of the Code. This term, "person interested," when used in connection with an estate or fund, is declared, by § 2514, subd. 11, to include every person entitled to share in such estate or fund as husband, wife, legatee, next of kin, heir, devisee, assignee, grantee, or otherwise, except as creditor. When a person alleging himself to be



entitled as legatee under a testator's will, or as the assignee of a legatee, files a petition wherein he avers the existence of causes which would justify the removal of the executor, and prays that such removal be decreed, the executor can no more deprive the Surrogate of jurisdiction by disputing the petitioner's interest, than he can accomplish that result by disputing the existence of the causes that the petitioner may have assigned as the foundation of his application.

It is for the Surrogate to determine upon all the evidence, as well as the *status* of the petitioner as the justice and propriety of affording him the relief which he asks. It is not in the power of the respondent by a denial of the petitioner's allegations, in whole or in part, to entrench himself in the office from which he is sought to be removed, and bring to naught all proceedings for his dislodgment.

Now I agree with the referee that, upon the evidence returned with his report, Leonhard Gender is the person entitled under the will to the legacy bequeathed to Herman Busching. So far as the referee's findings concern that question, they are for the purposes of this proceeding, and for such purposes only, confirmed. But the case has been prematurely closed and submitted to the Surrogate. It will be sent back to the referee, that the petitioner may present evidence, as she may be advised, in support of her application for the respondent's removal from office.

850 CASES IN THE SURROGATES' COURTS.

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BOWNE V. LANGE.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—February, 1886.

BOWNE v. LANGE.

*In the matter of the judicial settlement of the account of LOUISA LANGE, as executrix of the will of WILLIAM H. LANGE, deceased.*

A Surrogate's court has jurisdiction, in proceedings for the judicial settlement of the account of an executor, to determine whether there has been a "dispute or rejection," by the latter, of "a claim against the estate of the decedent," within the meaning of Code Civ. Pro., § 1822.

HEARING of objections interposed by William R. Bowne, an alleged creditor of decedent, to the account filed by Louise Lange, executrix of his will, in proceedings for judicial settlement.

BLAIR, SNOW & RUDD, *for petitioner.*

S. H. STUART, *for executrix.*

THE SURROGATE.—In response to a citation issued herein at the petitioner's instance, the executrix of this estate has filed an account of her administration. She now asks that that account be approved and passed, notwithstanding certain objections interposed thereto by the petitioner. She insists that she disputed and rejected the petitioner's claim in February, 1884, more than six months before any proceeding was taken for its enforcement, and that accordingly, by virtue of § 1822 of the Code of Civil Procedure,

the petitioner is forever barred from compelling its payment and must be treated as one having no interest in the estate.

The petitioner contends, on the contrary, that his claim was duly presented to the executrix, and that she has never rejected or disputed it.

The Surrogate's court is a court of competent jurisdiction, to determine the issue whether a claim of this character against a decedent's estate has actually been disputed or rejected, or whether, on the other hand, it has been admitted by the representative of such estate (*Hoyt v. Bonnett*, 50 *N. Y.*, 538; *In re Jones*, 1 *Redf.*, 269; *Ruthven v. Patten*, 2 *Abb. Pr.*, *N. S.*, 121; *Matter of Phyfe*, 5 *N. Y. Leg. Obs.*, 331; *Estate of George*, 1 *Law Bul.*, 87; *Magee v. Vedder*, 6 *Barb.*, 352; *Tucker v. Tucker*, 4 *Keyes*, 148; *Lambert v. Craft*, 98 *N. Y.*, 342).

If it shall appear, upon investigation, that the petitioner's claim has been disputed or rejected, and that, within the time specified in the section above cited, no proceeding has been begun for its enforcement, the Surrogate must regard such claim as barred, and must enter a decree disregarding it, and directing distribution of the estate among the parties entitled. If it shall appear, on the other hand, that the claim has not been so disputed or rejected, it must be considered as liquidated and as an undisputed debt, which the representative is obliged to pay, and because of which the petitioner is entitled to be heard upon his objections to the account.

A reference will be ordered for the trial of this issue.

STOLZEL V. CRUIKSHANK.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—February, 1886.

STOLZEL v. CRUIKSHANK.

*In the matter of the estate of JOHN F. DELAPLAINE,  
deceased.*

As to whether the nomination, by a will, of a designated person as executor thereof, is revoked by a codicil which names a different person to act in such capacity, but omits expressly to recall the prior appointment—*quære*.

MOTION by Amalia A. Stölzel and another, claimants under an alleged codicil to decedent's will, to stay issue of letters testamentary. The facts appear in the opinion.

HENRY W. TAFT, *for the motion*.

GEO. R. SCHIEFFELIN, *for proponents of will*.

L. B. CHASE, *for heir at law*.

THE SURROGATE.—The paper purporting to be the last will of this decedent was admitted to probate as such in June, 1885. Upon the petition of certain persons claiming to be legatees and devisees under an alleged codicil to such will, the petitioners were allowed to intervene, and, it appearing that by such alleged codicil certain persons were named as executors, other than the persons appointed as such by the will, the issue of letters testamentary was delayed until the codicil might be presented for probate.

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MORGAN V. MORGAN.

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I do not think that letters should be longer withheld. The alleged codicil may never be proved; and it is by no means certain that, in case it shall be proved, the clause in which appears its nomination of executors will be deemed to work a revocation of the similar clause in the paper already admitted to probate. Cases are not wanting where joint letters have been granted to two persons of whom one has been named as sole executor in a will and the other as sole executor in a codicil (In Goods of Leese, 31 *L. J.*, *N. S.*, *P. M. & A.*, 169; Geaves v. Price, 32 *id.*, 113).

Letters may issue to Mr. Cruikshank. In case the alleged codicil shall hereafter be proved, letters may of course be granted to any qualified persons whom it designates as executors. Whether the functions of Mr. Cruikshank will cease at that time is a question that can then be determined.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SUBROGATE.—February, 1886.

## MORGAN v. MORGAN.

*In the matter of the estate of LUCINDA L. MORGAN,  
deceased.*

Trustees who employ, in their own business, the funds held by them in a fiduciary capacity, will at least be held accountable for the highest legal rate of interest thereon; and the stringency of this rule will not be relaxed in consideration of the fact that the fund has at all times been protected against loss by reason of the misappropriation.

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MORGAN V. MORGAN.

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The rate of interest to be exacted from trustees, upon funds which they have failed to invest within a reasonable time, depends upon the circumstances of each case, and cannot be determined by an unvarying rule.

Testamentary trustees do not necessarily forfeit commissions by irregularities through which the *cestuis que trustent* have suffered no detriment.

Cook v. Lowry, 95 N. Y., 103—distinguished.

HEARING of exceptions taken by Henry Morgan and others to the report of the referee, to whom were referred the issues arising upon their accounting as trustees under the will of decedent. A previous phase of this case is reported in 3 *Dem.*, 612.

EVARTS, CHOATE & BEAMAN, *for trustees.*

PLATT & BOWERS, *for general guardian of Matthew Morgan and other infants.*

THE SURROGATE.—The referee, to whom were submitted the issues of this accounting proceeding, has found that the trustees are chargeable with simple interest, at six per cent., upon the moneys which, through the intervention of the Pigott mortgage, they borrowed from the trust fund in their hands, and applied to their personal uses and purposes. In deciding *Morgan v. Morgan* (3 *Dem.*, 612), I held that, though the act of the trustees in effecting this loan was open to censure, it was not such an act as established their unfitness to perform the duties of their trust, and as merited their removal from office. I expressly reserved, for subsequent determination, the question whether, by reason of that act, they had incurred any pecuniary liability.

Now, if they had, directly or indirectly, appropri-

ated these moneys from the trust fund without furnishing security, or adequate security, by mortgage or otherwise, the law is well settled that they could, on their subsequent accounting, have been charged, at the election of the *cestuis que trustent*, either with the profits that they had obtained by the use of those moneys, or with interest thereon at the legal rate.

In behalf of the *cestuis que trustent*, a claim is here made that their trustees be charged with interest. The fact that the estate has been at all times protected against loss, by reason of the loan in question, does not, in my judgment, relieve the trustees from this interest liability. I am not disposed to relax the stringency of the rule by which those who hold funds in a fiduciary capacity are forbidden to use such funds in the conduct of their own business. The exceptions to the referee's report in this regard are overruled, and, in addition to the five per cent., payable by the terms of the mortgage, the trustees must account for one per cent., upon the amount of the loan, from the date thereof to the date of the decree to be entered upon this accounting.

*Second.* I do not think that the referee has dealt too strictly with the trustees, in fixing the rate of interest with which he has held them chargeable upon the moneys that they suffered to remain from time to time in the New York Life Insurance & Trust Co. The evidence clearly shows that they were guilty of negligence in failing to make seasonable investment of these moneys in securities such as the courts of this State approve. As to the extent of the responsibility of trustees in this regard, it is impossible to

lay down any general rule. The rate of interest to which they should be held must always depend upon special circumstances, and it would be profitless to analyze the reported decisions in cases where facts have been presented more or less analogous to the facts appearing in the case at bar ; but it seems to me that, upon the authorities cited below, the conclusion reached by the referee is just and fair (*Dunscomb v. Dunscomb*, 1 *Johns. Ch.*, 508 ; *Schieffelin v. Stewart*, *id.*, 620 ; *Vanderheyden v. Vanderheyden*, 2 *Paige*, 288 ; *De Peyster v. Clarkson*, 2 *Wend.*, 77 ; *Ogilvie v. Ogilvie*, 1 *Bradf.*, 356 ; *Duffy v. Duncan*, 35 *N. Y.*, 187 ; *Gilman v. Gilman*, 2 *Lans.*, 1 ; *King v. Talbot*, 40 *N. Y.*, 95 ; *Shuttleworth v. Winter*, 55 *N. Y.*, 625).

This charge of five per cent. interest with annual rests should continue until the entry of the decree. The sums allowed by the Trust Company during the same period, by way of interest upon the funds in question, may be retained by the trustees for their own use.

*Third.* I hold that the trustees have not forfeited their right to commissions. The recent decision of the Court of Appeals, in *Cook v. Lowry* (95 *N. Y.*, 103), does not lead my mind to a contrary conclusion. That was a case in which trustees had been guilty of the grossest dereliction of duty.

The exceptions to the report of the referee must each and all be overruled.



NEW YORK COUNTY.—HON. D. G. ROLLINS, SDRRO-GATE.—February, 1886.

TILDEN v. FISKE.

*In the matter of the estate of WILLIAM TILDEN,  
deceased.*

A provision in a will, for the exigency of a resignation on the part of those therein nominated executors and trustees, though not to be construed as indicating an intent that a nominee having qualified as executor, may abandon his trust at pleasure, is entitled to weight in determining whether a cause assigned by an executor for his proposed resignation should be deemed sufficient to justify it.

One who had, for sixteen years, been actively engaged in performing his duties as one of the trustees of a testamentary trust, the administration of which was nearly completed, having applied to the court for his discharge, it was shown that he intended to reside without the United States, that further attention to his duties would for that reason be inconvenient if not impracticable, and that his retirement would not be likely to embarrass the management, the chief burden of which had hitherto rested upon him.—

*Held*, that “sufficient reasons” were presented, within Code Civ. Pro., §§ 2690, 2814, “for granting the prayer of the petition.”

PETITION by Josiah N. Fiske, and others, nominated as executors of and trustees under decedent's will, for leave to resign ; opposed as to Mr. Fiske, by certain of the legatees. The facts appear sufficiently in the opinion.

C. E. TRACY, *for petitioners.*

W. S. MACFARLANE, *for B. B. Tilden.*

C. A. HAND, *for Wm. Tilden.*

CHAS. H. WOODBUFF, *for M. Tilden.*

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TILDEN V. FISKE.

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D. J. NEWLAND, *for M. C. Tilden.*

A. H. MAN, *for Almira Tilden.*

THE SURROGATE.—This decedent died in June, 1869, leaving a will which was admitted to probate in July of the same year. By the terms of that instrument five persons were named as its executors; among the number were Mr. David Dows and Mr. Josiah N. Fiske, both of whom were granted letters testamentary in 1869, and both of whom have been acting thereunder ever since. They now ask leave to resign. Mr. Nathan C. Ely, to whom letters were issued in 1870, joins in this application of his co-executors. The grounds which Mr. Ely and Mr. Dows assign for their proposed retirement are admitted by all persons interested in the estate to be sufficient. The application of Mr. Fiske, on the other hand, is opposed. It is claimed that he has not given adequate reasons for surrendering his trust, and that, if such surrender is sanctioned, it may embarrass the future administration of the estate.

I cannot uphold, in its entirety, the contention of counsel for the petitioners, that his clients have hitherto acted as executors simply; that the duties which remain to be performed under the will and its codicils are those of testamentary trustees; that the petitioners did not, by qualifying as executors, undertake to render service as such trustees, and that they have, therefore, an absolute right to the relief which they seek.

Whether the instruments under which the petitioners have been acting must be interpreted as con-

templating at some stage of the administration the cessation of purely executorial functions, and the assumption, by the persons named as executors, of the functions of testamentary trustees, is a question that, under recent decisions, may not perhaps be altogether free from doubt, and that I am not now required to determine.

I am entirely clear, however, that either the trusts which are yet to be discharged can be discharged by executors, as such, or that certain trusts which have been fulfilled already must be deemed to have been fulfilled by the petitioners in the character of trustees. In either event, they are not now entitled to resign, except with the consent of the *cestuis que trustent*, or by permission of a competent court.

If they are to be regarded as executors simply, their qualified right to the revocation of their letters testamentary, and the Surrogate's authority to decree such revocation, are established by §§ 2689, 2690 of the Code of Civil Procedure. If they are to be deemed testamentary trustees, the Surrogate must look to § 2814 of that Code, as the source of his authority to sanction their resignations; and their retirement, whether as executors or as trustees, must be permitted or disapproved accordingly as the Surrogate shall or shall not find that such retirement is justified by "sufficient reasons."

It is provided by § 2819 that, where persons have acted both as testamentary trustees and as executors, they may, in a proper case, obtain relief in both capacities, by instituting a single proceeding for that purpose.

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TILDEN V. FISKE.

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I do not think that, upon the petition and citation before me, any decree providing for the resignations of the petitioners as testamentary trustees can properly be entered. As I have determined, however, for reasons stated below, that the petitioners are entitled to be freed altogether, from further labors and responsibilities in connection with this estate, I shall, in deciding their application upon its merits, treat this proceeding as though it were regularly brought in accordance with the provisions of § 2819. The applicants may, if they shall see fit, amend their petition and obtain the issuance of new citations in conformity with that section; otherwise they will be granted relief as executors only.

I have already stated that, as regards Mr. Dows and Mr. Ely, the prayer of this petition is not opposed. Mr. Fiske declares that it is his purpose to make important changes in his manner of life which will involve such prolonged absences from the United States as to make his further attention to the duties of his trust inconvenient and impracticable. It is conceded that the care and pains of managing this estate during the period that has elapsed since the testator's death have, in a large measure, fallen to the lot of Mr. Fiske.

Now, the testator saw fit, by his wills and codicils, to make an unusually careful provision for supplying vacancies that might from "death, neglect to qualify, disqualification, resignation, or removal," arise in the ranks of his executors. He evidently contemplated that, in the course of the years that would naturally elapse before their tasks would be completed, such

vacancies would inevitably occur. It will be noticed that he provided expressly for cases of "resignation," and while this circumstance does not indicate an intention on his part that any person who should qualify as an executor might abandon his trust at will, it is, nevertheless, entitled to consideration in determining whether a cause assigned by an executor for his proposed resignation should be deemed sufficient to justify it.

Mr. Fiske has been actively engaged in discharging the duties of his office for sixteen years, and lately participated in the sixth accounting of the executors. The administration is now well nigh completed. The debts have long since been paid, the assets realized, and, so far as practicable, distributed. The eldest son of the testator, who was granted letters testamentary nearly nine years ago, is still taking part in the administration of the estate, with the approval of all the parties interested, and does not ask to be retired. For aught that appears, he is fully competent for the discharge of the duties which yet remain to be fulfilled.

I find in reported judicial decisions little light as to what causes courts should regard as sufficient to warrant the resignation of executors and trustees; but it seems to me that, under all the circumstances, Mr. Fiske's claim to be relieved is entitled to favorable consideration, and that to compel his longer continuance in office would be to impose upon him a burden heavier than the testator intended he should bear.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—March, 1886.

MOORHOUSE v. HUTCHINSON.

*In the matter of the estate of HIRAM HUTCHINSON,  
deceased.*

One who has been removed from office as testamentary trustee cannot be brought into court by the *cestui que trust*, under Code Civ. Pro., § 2804, upon a petition to compel him, either alone or in conjunction with his successor, to pay to the petitioner income of the trust, received by him before his removal.

An answer to a petition presented under Code Civ. Pro., § 2804, praying for a decree directing the payment of money by a testamentary trustee, wherein respondent asserts—that he is not possessed of knowledge or information sufficient to form a belief as to whether petitioner's claim is valid and legal or not—does not oblige the court to dismiss the petition, under *id.*, § 2805.

PETITION by Mary F. Moorhouse, a legatee and devisee under decedent's will, praying for a citation directed to Mary Ann Hutchinson, who had been removed from office as executrix thereof and trustee thereunder, and to the Central Trust Company, her successor, and others, requiring them to show cause why petitioner should not have an advance of \$20,000 out of the funds of the estate.

O. J. WELLS, *for petitioner.*

CHAS. H. WOODRUFF, *for Mary Ann Hutchinson.*

THE SURROGATE.—I must deny this application, so far as it seeks to compel the discharged trustee to exercise any power that she may be supposed to possess for directing, either separately or in conjunction

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MOORHOUSE V. HUTCHINSON.

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with her successor, the disposition of the surplus income of this estate, and the payment of any sum to the petitioner out of any such surplus received by such trustee before her removal. For granting relief of that character, in a proceeding such as the present, I find no warrant in the statutes. This proceeding is founded upon § 2804 of the Code of Civil Procedure, and can properly be instituted only against a testamentary trustee in office. This respondent was displaced from office in August, 1885, at the petitioner's instance.

The answer of the present trustee undertakes to set forth facts showing that it is doubtful whether the claim of the petitioner is valid and legal. The trustee fails, however, to make such a denial of the legality or validity of that claim as necessitates, when taken in connection with the alleged facts, a dismissal of the petition under § 2805. This section provides that, to entitle a respondent to such dismissal, he must, in addition to the allegation of facts, *deny*, either absolutely, or upon information and belief, the validity or legality of the petitioner's claim. The respondent in the case at bar simply asserts that he is not possessed of knowledge or information sufficient to form a belief as to whether the claim is valid and legal or not.

I shall allow the respondent Trust Co. ten days within which to amend its answer in this particular, should it be so advised, and in that event the petition will be dismissed (*Rank v. Camp*, 3 *Dem.*, 278; *Hurlburt v. Durant*, 88 *N. Y.*, 121). Otherwise it will be further considered.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SUBROGATE.—March, 1886.

MEAD v. WILLOUGHBY.

*In the matter of the estate of MARY WILLOUGHBY, deceased.*

Where one of two executors presents his account for judicial settlement, as permitted by Code Civ. Pro., § 2729, his associate, who is required by that section to be cited to attend the settlement, is entitled to file objections, under the provision of § 2730, that "any party may contest the account with respect to a matter affecting his interest in the settlement and distribution of the estate." But attorneys claiming to be creditors, in respect of services rendered to the executors, have no such standing.

MOTION by Mary L. Willoughby, executrix of decedent's will, for the dismissal of objections to her account, filed by Garret I. Mead, executor thereof.

CANTNOR & SELDNER, *for executor.*

GEO. F. LANGBEIN, *for executrix.*

THE SURROGATE.—The will of this testatrix was admitted to probate in April, 1884. It appointed Mary L. Willoughby its executrix and Garret I. Mead its executor.\* Both were subsequently granted letters testamentary. In December last, the executrix filed her account. Objections were interposed thereto by Mr. Mead, and by Cantnor & Seldner, who claim to be creditors of the estate, by reason of legal services rendered to its executors. The issues raised by the



account and the objections thereto are still pending before a referee. It is now claimed by the executrix that the executor is not a creditor of the estate, and has no beneficial interest therein, and that his objections to her account should therefore be dismissed.

This contention is unsound. By § 2729 of the Code of Civil Procedure, the executrix was bound to cite the executor to attend her accounting. Section 2730 provides that, upon the return of a citation in such a proceeding, the Surrogate must hear the allegations and proofs of *the parties* respecting the same. The section further declares that "any party may contest the account with respect to a matter affecting his interest in the settlement and distribution of the estate." This section has taken the place of the following provision, which was on the statute book at the time of the enactment of the Code: "Any creditors, legatees or other persons interested in the estate of the deceased as next of kin, or otherwise, may attend the settlement of such account and contest the same" (R. S., part 2, ch. 6, tit. 3, § 63; 3 Banks, 6th ed., 102). It was held by my predecessor that, within the meaning of that provision, an executor had a right to appear and be represented by counsel in presenting his objections to his co-executor's account (Matter of Rich, 3 *Redf.*, 177). This decision was approved on appeal by the Supreme court in Buchan v. Rintoul (10 *Hun*, 183; *aff'd* 70 *N. Y.*, 1). DAVIS, P. J., pronouncing the opinion of the court, said that the executor, whose right to dispute the accounting of his co-executor was there brought in question, did not occupy the mere naked

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REILLEY V. DUFFY.

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relation of executor, as the residuary estate was expressly bequeathed to him in trust; but the learned Justice did not intimate that the claim of the objector would not have been sustained, even in case he had been executor pure and simple. On the contrary, so far as any intimation is given upon that subject, the court seems to favor the position that is here taken by counsel for executor Mead.

The Code provisions above cited were enacted in the light of these decisions, and clearly contemplate, I think, that an executor is a person interested in the entire estate, its proper management, the payment of its just debts, the collection of its assets and the distribution thereof among persons entitled thereto. The motion to dismiss the objections filed by Mr. Mead is denied. On their own showing, Cantnor & Seldner are not creditors of the estate (*Ferrin v. Myrick*, 41 *N. Y.*, 315; *Mygatt v. Wilcox*, 45 *id.*, 306). Their objections must, therefore, be dismissed.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—March, 1886.

## REILLEY v. DUFFY.

*In the matter of the estate of CHARLES DUFFY, deceased.*

A mere appearance of interest in the estate of a decedent is ordinarily sufficient to sustain an application, under Code Civ. Pro., § 2726, to compel a judicial settlement of the account of its representative; as where the interest of petitioner appears to have been extinguished by a release which he attacks as void.

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REILLEY V. DUFFY.

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THIS was an application by a father and guardian on behalf of infants for the judicial settlement of the account of Letitia Duffy, the administratrix of their maternal grandfather's estate; opposed by the administratrix on the ground that the infants were not "persons interested" in the estate, under Code Civ. Pro., § 2514, and therefore not entitled to an accounting under § 2726.

To sustain her position, the administratrix produced and read a release, executed by the mother of the infants in her lifetime to the administratrix, as follows:

New York, January 6th, 1885.

I, Mary C. Reilley, of Bridgeport, Connecticut, on this day, for the consideration of one dollar, release and sell whatever claim or title I have in the real or personal estate of my deceased father, Charles Duffy, to my mother, Letitia Duffy.

MARY C. REILLEY.

This answer the petitioner met by an affidavit that his wife was induced to execute the paper purporting to be a release during her last sickness, and at a time when she was very ill, by the fraud, coercion and undue influence of the respondent, and that it was not her free act and deed.

CHARLES G. CRONIN, *for petitioner.*

R. S. CRANE, *opposed.*

THE SURROGATE.—This is a proceeding wherein the petitioner, as the guardian of the two infant children of Mary C. Reilley, deceased, applies for an order directing the administratrix of this estate to file an account. The respondent concedes that previously to

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FRAME V. WILLETS.

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January 6th, 1885, Mrs. Reilley, who was one of the daughters of this decedent, was a person interested in his estate; but by the answer of the administratrix it appears that, on that day, she executed and delivered to her a release of her interest therein.

The execution and delivery of this release are not disputed, but the petitioner has filed an affidavit alleging that it was obtained by the fraud, coercion and undue influence of the respondent.

The question whether the release is for this cause invalid, the Surrogate has no jurisdiction to determine. But in view of the sworn allegation of its invalidity, I must order an accounting (*Fraenznick v. Miller*, 1 *Dem.*, 136; *Harris v. Ely*, 25 *N. Y.*, 138; *Rieben v. Hicks*, 4 *Bradf.*, 136; *Schmidt v. Heusner*, *ante*, 275).

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—March, 1886.

## FRAME v. WILLETS.

*In the matter of twelve several accountings in the estate of SAMUEL WILLETS, deceased.*

Testator, by his will, appointed the executors trustees of twelve several trusts thereby created for the benefit of divers specified persons for life, with respective remainders over. Seven of these were accordingly set up by the executors, who, upon their accounting as such, in 1885, were directed by the decree to pay to themselves, as trustees, moneys requisite to constitute the funds for the remaining trusts. The trustees having presented twelve accounts for separate settlement, it was

## FRAME V. WILLETS.

objected that they were to be treated as executors, simply, and that all their proceedings might properly have been set forth in a single account and be passed upon by a single decree.—

*Held*, that the several special proceedings were duly instituted, and that a motion for their consolidation should be denied.

*Held*, also, that the accounting parties were entitled to half-commissions upon the capital of the several trusts, for receiving the same from themselves as executors.

Testamentary trustees who have received commissions at the rate of five, and two and one half, per cent. on a fund of \$10,000 or upwards, are nevertheless thereafter entitled to annual commissions, at the full rate, upon the income of each year, unless the will of their testator contains a provision inconsistent with such allowance.

*Andrews v. Goodrich*, 3 *Dem.*, 245—modified; *Matter of Mason*, 98 *N. Y.*, 527—followed.

Testator's will established a trust fund for the payment of certain life annuities, providing that, as the annuitants severally died, such portion of the fund as could be spared be divided among his grandchildren living at the time of such deaths. A codicil revoked all the provisions and bequests given to a grandchild, L., and her issue, *in the residuary clause* of the will.—

*Held*, that L. was, nevertheless, entitled to share in the distribution of the remainders in the annuity fund.

An objection, filed upon an accounting by trustees, to the effect that "the trustees have not accounted for interest on the moneys in their hands," is too indefinite and uncertain to be regarded, and must be amended before it can be pressed.

HEARING of objections to the accounts filed by Robert Willets and others, executors of and trustees under decedent's will, in proceedings for judicial settlement. The facts appear sufficiently in the opinion.

WILSON M. POWELL, *for accounting parties.*

GEORGE H. FORSTER, *for beneficiaries.*

THE SURROGATE.—Shall these twelve accountings be consolidated into one proceeding?

*First.* The testator's will contains, among other provisions, the provisions following:

VOL. IV.—24

*1st.* It directs the persons named as his executors to hold certain specified stocks belonging to his estate during the lifetime of Sarah A. Willets, the widow of his deceased son Jacob, to apply the dividends arising therefrom to the use of said Sarah for life, and after her death to divide the proceeds of the principal fund among her children.

*2nd.* It directs the persons so named as executors to hold certain other specified stocks, to apply the income therefrom to the use of Cornelia A. Willets, widow of the testator's deceased son Edward, during her life, and at her death to divide the proceeds of the principal fund among the testator's "grandchildren who shall be living at her death."

*3rd.* It makes similar provision for the testator's son Robert, so long as he shall live, and for his lawful issue after his decease.

*4th.* It orders the periodical payment of certain sums to certain specified annuitants during their respective lives, and orders further that an amount sufficient to produce such annuities shall be set apart for that purpose.

*5th.* It provides that the executors shall divide the sum of \$300,000 into four equal shares; that they shall invest each of such shares and apply the income arising therefrom to the following named persons respectively for life: Caroline W. Frame, Edward Willets, Frederick Willets, and Walter R. Willets, children of the testator's deceased son Jacob; and that, on the decease of each of such beneficiaries for life, they shall pay over the principal fund of which he or she shall have theretofore enjoyed the income, "to and among

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FRAME V. WILLETS.

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his or her lawful issue, each child taking one share," etc.

6th. The residuary estate the testator gave, by his will, to his executors, in trust for the purposes following: To convert the same into cash, to divide the net proceeds into as many shares as there should be of his grandchildren at his death, to invest and to keep invested "all of said shares," to apply the interest, income and dividends of "one of said shares" to the use of Caroline W. Frame, one of such grandchildren, for her life, and from and after her death to pay over the principal of that share to her lawful heirs; to apply the interest, income and dividends of each of four others of said shares to each of the four other grandchildren of the testator for their respective lives, and as such life beneficiaries should respectively die, to pay the principal to his or her lawful issue.

One of the five residuary trusts thus created by the will was subsequently extinguished by a codicil. The result of this extinguishment is this: That the four persons interested for life in the four several trusts of \$75,000, are the same persons who are each given a life interest in one fourth of the residuary estate. And, moreover, when the respective life interests in the \$75,000 trusts and in the residuary trusts shall be extinguished, the very persons who will become entitled to the principal of the one will also become entitled to the principal of the other. It seems to me, therefore, that the trustees might have included in one proceeding an account of their management of the residuary trusts, and of the trusts of \$75,000, and thus have compressed eight of these accountings into

four. But the special guardian of the infant remaindermen objects that, while such a course would occasion additional expense to the infants, it would result in no saving, but rather in a loss to the beneficiaries for life ; and that the accounts should therefore be kept distinct, just as the trustees have chosen to render them. I think that his view is correct, and that Mr. Forster's motion for a consolidation of these twelve proceedings into one, or into any other number less than twelve, must be denied. These are my reasons :

The accounts which were settled and determined by the decree of April 29th, 1885, showed that the four \$75,000 trusts and the three specific trusts for Sarah A. Willets, Cornelia A. Willets, and Robert Willets, respectively, had been theretofore set up. That decree provided that the executors, out of the assets in their hands, should pay to themselves as trustees, the sum of \$400,000, the same to be held as a fund for producing the several annuities provided for by the will. It provided further that the executors should pay to themselves, as trustees of the residuary estate, the balance of principal remaining in their hands.

Now, when regard is had to the terms of the will, to the above cited provisions of the decree heretofore entered, and to the actual separation of the funds of these several trusts from all other funds of the estate, it is impossible to sustain the contention of these objectors that the persons here accounting are to be treated as executors simply, and that all their proceedings may properly be set forth in a single ac-



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FRAME V. WILLETS.

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count and settled and determined by a single decree. It was, in my view, the purpose of this testator that, with the exception already noted, each of the various trusts by him created should be separate and distinct from every other, and should, after it had been once established, be managed by its trustees as independently of every other as if such other had never been created, or had been committed to other hands.

Each of the persons interested for life in the several residuary trusts, for example, could have compelled these accounting parties to do the very thing which they in fact have done—that is, to make an utter and absolute separation of the fund applicable to that particular trust from all other funds of the estate. Similarly, any one of the annuitants could have insisted upon the setting apart of a fund sufficient to produce the aggregate annuities, which fund should thenceforth be kept by itself, and be specially devoted to the special purposes of its creation. The mere fact that the testator has designated the same persons whom he has appointed his executors to act also as trustees of each and all the various trusts for which the will provides, does not make the situation practically different from what it would be if he had named A. and B. as executors, C. and D. as trustees of one or more of the trusts, and E. and F. as trustees of others (*Hurlburt v. Durant*, 88 *N. Y.*, 121; *Matter of Roosevelt*, 5 *Redf.*, 601; *Johnson v. Lawrence*, 95 *N. Y.*, 154; *Laytin v. Davidson*, 95 *id.*, 263; *Matter of Mason*, 98 *id.*, 527; *Phoenix v. Livingston*, 101 *id.*, 451).

I have no doubt that one or more of these account-

ing parties might, upon due cause being shown therefor, be removed from his office as trustee of the annuity trusts, for example, without affecting his *status* as executor or as a trustee of other trusts. Nor have I any doubt that, in case a vacancy shall occur in the executorship while a portion of the estate shall be still unadministered, any person who may be appointed administrator with the will annexed will be without authority to perform, as such, any of the duties that now devolve upon these accounting parties as trustees. The case at bar cannot be distinguished in these respects from the cases of *Laytin v. Davidson (supra)*, *Matter of Mason (supra)*, and *Matter of Roosevelt (supra)*.

*Second.* It is a necessary corollary from the above proposition that the accounting parties in these several proceedings are entitled to commissions as trustees in addition to such as have been already allowed them as executors, and this, too, as regards the principal of the several funds now held by them, as well as the income received and paid out. Upon income they are entitled, in each instance, to a commission of five per cent. upon the first thousand, two and one half per cent. upon the next nine thousand, and one per cent. upon the remainder. In *Andrews v. Goodrich (3 Dem., 245)*, the Surrogate of this county held that, where commissions at the rate of five and two and one half per cent. had been received by trustees on the *corpus* of a trust fund of \$10,000 or upwards, only one per cent. could be allowed for receiving and paying out income; but the decision of the Court of Appeals, in the *Matter of Mason (supra)*, has since

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FRAME V. WILLETS.

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established that, under such circumstances as here appear, trustees are entitled to annual commissions at the full rates upon the income of each year, unless in the will of their testator there is some special provision inconsistent with such allowance. I see no reason why the decree to be entered upon these accountings should not provide for the retention by the accounting parties of one half commissions for receiving the capital of the several trusts (*Rowland v. Morgan* 3 *Dem.*, 289).

*Third.* For certain sums expended for clerk hire and for taxes upon the whole estate, including the portions carved thereout for the various trust funds, the trustees ask credit in these accounts. These disbursements are charged to the several trusts upon what is claimed to be a *pro rata* basis. I see no objection to the course that has here been pursued, unless the gross payments have been excessive in amounts or the apportionment of the burden has been inequitable. If either of those contentions is made, I must direct a reference.

*Fourth.* By his provision regarding the fund for annuitants, the testator directs that, as these annuitants shall severally die, such portion of that fund as can safely be spared "shall be divided among my grandchildren who shall be living at the time of the death of the respective annuitants."

It is claimed by counsel for the four grandchildren of the testator who are given a life interest in the residuary estate, that his grandchild, Amelia W. Leavitt, is excluded from sharing in this surplus of the annuity fund by the following provision in the codi-

cil: "In consequence of having made large and sufficient provisions, bequests and devises to my granddaughter, Amelia W. Leavitt, and her issue, in the other portions of my will, I hereby annul and revoke all the provisions and bequests given to her and her issue *in the residuary clause thereof*, and I hereby will and direct that my executors divide the residuary fund therein provided for into as many shares as there shall be of my grandchildren, exclusive of the said Amelia W. Leavitt," etc.

Now, the surplus of this annuity fund is no part of the residue, and no provision for its distribution is made in the residuary clause. The will does not declare that, as such surplus shall arise, it shall fall into the residuum, but expressly directs its division among all the testator's grandchildren then living. That direction stands unrevoked, and Mrs. Leavitt is entitled, equally with the other children, to share in the surplus (*Wetmore v. Parker*, 7 *Lans.*, 121; *affi'd* 52 *N. Y.*, 450, 462). Of course, the same criticism applies to the principal of the Cornelia A. Willets trust, which is ordered, by the second article of the will, to be divided, upon her death, among the testator's grandchildren who shall be then living.

*Fifth.* By the decree of April 29th, 1885, the executors were directed to proceed with the administration of certain assets still left in their hands. They were ordered to retain \$110,000, to abide the result of an appeal to the Court of Appeals respecting the validity of a provision in the will for the disposition of \$100,000, and to retain \$348,000 for the satisfaction of legacies to certain charitable institutions, which

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FRAME V. WILLETS.

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legacies have not yet fallen due. In the accounts now before the court, no mention is made of the action of the executors with respect to these matters, or with respect to any other matters in the management of which there are still to be exercised executorial functions. The objections to these omissions must be overruled. The accounting parties are not here undertaking to account as executors.

*Sixth.* I have now considered all the objections interposed to these several accounts, except the objection "that the trustees have not accounted for interest on the moneys in their hands." This should be made more definite. It should clearly appear whether it is meant to be claimed that the trustees have actually received interest for which they have not accounted, or that, by the diversion of trust moneys to their own use, or by culpable neglect in making investments, or from some other cause, they have become chargeable with interest as if they had obtained it. The objection may be amended in this regard, if counsel for the contestants wishes to press it; if not, and if a reference is not desired upon the question of clerk hire and taxes, a decree may at once be entered in accordance with this decision.

NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—March, 1886.

CLARK v. BUTLER.

*In the matter of the estate of MARY S. CLARK,  
deceased.*

No exception to the ordinary rule—that a legacy, in general, begins to bear interest only at the expiration of a year from the testator's death—is created by the fact that a sum has been bequeathed to one for life, with remainder over; or that the life beneficiary is a *cestui que trust*; or that executors are expressly allowed, in their discretion, to apply interest of a trust fund to the maintenance of an infant beneficiary, during minority.

A bequest of a fund to executors, in trust to accumulate the income during the minority of a legatee, to whom the principal and accumulation are made payable on his arriving at full age, entitles the beneficiary to interest from the testator's death, where he is of age when that happens, or from the date of his reaching majority, where the same occurs within a year thereafter.

A legacy drawing interest draws interest at the statutory rate.

Whether claimants of a legacy under the will of a non-resident decedent, whose personal representative is accounting in this State, are entitled thereto according to the statutes of the state of decedent's late residence, is a question which may lawfully be determined here; though the court has a discretion as to remitting the controversy to the domiciliary tribunal.

Testatrix died domiciled in Massachusetts, leaving no creditors in New York, and nominating different executors, as regarded personal property in the two states, respectively.—

*Held*, that the executor for this State, after setting up certain trusts created by the will, and reserving a sum sufficient to cover the expenses of his administration, should transmit the remaining assets to the foreign representative, for distribution.

CONSTRUCTION of decedent's will, upon judicial settlement of account of William A. Butler, executor thereof. The facts are stated in the opinion.

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CLARK V. BUTLER.

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GEO. C. HOLT, *for executor.*

HORACE RUSSELL, PAYSON MERRILL, and CRANE & LOCKWOOD, *for legatees.*

T. E. TOMLINSON, *special guardian.*

THE SURROGATE.—By the fifth article of her will this testatrix bequeathed to her executors \$80,000, with the direction that they set apart the same securely invested upon bond and mortgage, or in such other safe manner as they should think best, in trust to receive the income thereof and to apply it as follows :

1st. The income of \$10,000 to be paid over, as it should accrue and be received by the executors, to Delia Holman during her natural life, the principal sum to be divided at her death among her children.

2nd. The income of \$10,000 to be paid over in like manner to Cynthia Clark for life, with remainder to her daughter.

3rd. The income of \$20,000 to be paid to Mary E. Clark for life, remainder to her children.

4th. The income of \$10,000 to be accumulated by the executors for the benefit of Lillie M. Clark, until she should arrive at the age of twenty-one, and then to be paid to her, together with the principal.

5th. The income of \$10,000 to be similarly accumulated for the benefit of Jennie P. Clark until she should arrive at the age of twenty-one, and then to be paid to her, with the principal.

6th. The income of \$20,000 to be accumulated during the minority of the children of George H. Clark, living at the death of the testatrix, such in-

come and principal to be distributed among them equally as they should attain their majority.

The will further provided that the executors might apply any part of the interest of the funds so directed to be held in trust for the benefit of Lillie M. Clark, Jennie P. Clark and the children of George H. Clark to the support and maintenance of those beneficiaries, respectively, if, in the discretion of the executors, such a course should be deemed necessary.

The testatrix died in July, 1884, leaving an estate valued, according to the inventory, at about \$120,000, of which amount \$83,000 was invested in United States securities, real estate mortgages and railroad bonds. These investments still remain in the hands of the executor. He has not set apart the trust fund for which the fifth article of the will makes provision. In his accounting proceeding now pending in this court, several questions are presented for determination:

*First.* At what rate shall interest be allowed to the several beneficiaries of income, under the provisions above quoted, from article five and from what time shall such interest be computed?

Delia Holman is a sister of this decedent. Cynthia Clark is the wife of a brother of decedent's deceased husband. The other beneficiaries for life are decedent's nephews and nieces. I hold that, with the exceptions hereafter indicated, these legatees are entitled to nothing by way of interest or income for the year next succeeding the death of the testatrix. That this is the general rule is of course well settled (*Bradner v. Faulkner*, 12 *N. Y.*, 472; *Law-*



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CLARK V. BUTLER.

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rence v. Embree, 3 *Bradf.*, 364; Vernet v. Williams, 3 *Dem.*, 349). It seems to me that the bare fact that a legacy (not being a legacy of the residue) is given to one person for life with remainder to another, or the fact that the testamentary provision for the life beneficiary is a trust provision, does not serve to prevent the operation of this rule. In such cases the executor is ordinarily under no obligation to set apart the principal sum on which interest is to be calculated until after the lapse of a year from his testator's death, and unless the will otherwise directs, or the situation of the beneficiary, his relation to the testator, or some other circumstance, makes a different construction necessary, the residuary legatee is entitled to the benefit of the first year's income.

In *Nahmens v. Copely* (2 *Dem.*, 253), I held that one for whom a trust provision was made by a testator, for the application of interest or income of a specified sum to the use of such person, did not, except under special circumstances, become entitled to interest from the testator's death. For the reasons stated in the decision of that case, I do not regard *Cooke v. Meeker* (36 *N. Y.*, 15) as decisive of the question here presented. As to the first and second of the above quoted provisions from the fifth article, I am of opinion that neither of them began to draw interest until one year after the testator's death. In respect to the third, a different question is presented. Mary E. Clark died in March, 1885. Under the express provisions of the will, her children are entitled to interest on their respective shares of \$20,000 from the date of their mother's death (*Booth v. Ammer-*

man, 4 *Bradf.*, 129; *Coventry v. Higgins*, 14 *Sim.*, 30).

The testatrix has also definitely fixed the time of payment of certain other of the legacies. At the time of her decease, Lillie M. Clark, Jennie P. Clark and certain of the children of George H. Clark were more than twenty-one years of age. Their legacies, therefore, began to draw interest at once. Others of the children of George H. Clark came of age within a year thereafter. They can justly claim interest from the time when they respectively attained their majority. I do not think that the direction of the will that the executors should have leave in their discretion to apply the interest of certain of the trust funds to the support and maintenance of some of the infant beneficiaries during their minority, brings this case within the doctrine of *Nahmens v. Copely* (*supra*), so as to warrant the allowance to such beneficiaries of interest from the death of the testatrix. None of these infants were her children, and it does not appear that they were in any way dependent upon her during her life. As to each of them the primary direction of the testatrix is, that the income and interest should be accumulated for their benefit until they should respectively arrive at the age of twenty-one. It is clear that the testatrix did not deem it probable that the income of the several trust funds would be needed, and it is not claimed that it has in fact been needed, for the support and maintenance of these beneficiaries.

*Second.* Such interest as I allow on these legacies may be computed at the legal rate (*Nahmens v.*

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CLARK V. BUTLER.

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Copely, *supra*; Hoffman v. Penn. Hospital, 1 *Dem.*, 118).

*Third.* The will appoints Mr. Butler, who is here accounting, executor in reference to all property in the State of New York or elsewhere out of the State of Massachusetts. It appoints Mr. Whitney of Massachusetts, executor, as regards personal property in that state. It is not disputed that the decedent at the time of her death was domiciled in Massachusetts. As there are no New York creditors, I agree with counsel for the residuary legatees that this accounting executor, after setting up the \$80,000 trusts for which the fifth article of the will provides, and reserving a sum sufficient for covering the expenses of his administration and the costs of this accounting, should transmit the remaining assets to the Massachusetts executor for distribution; but with this exception:

By the fourth article of the will, a cousin of the testatrix, Mrs. Cora S. Hewes, of Pass-Christiansburg, Miss., was bequeathed the sum of \$5,000. Mrs. Hewes predeceased the testatrix, leaving eleven children her surviving. These children have been cited to attend this accounting and have appeared. It is insisted on their behalf that, by the law of Massachusetts, they have a lawful claim to the \$5,000 to which their mother would now be entitled were she alive to demand it. It is admittedly a question, not of jurisdiction, but of judicial discretion, whether the contention of the Hewes children shall be here determined, or whether the \$5,000 involved in that contention shall be remitted to the Massachusetts executor. It often

happens, of course, that questions respecting rights to money or property must be determined in the courts of one state according to the law of another. Whether, by the laws of Massachusetts, the claimants of this legacy are entitled to it, can lawfully be ascertained in this tribunal, to which they have been invited, and it seems to me that they should not be compelled to go to another (Matter of Hughes, 95 *N. Y.*, 55).

*Fourth.* I am not asked to decide at this time whether the provision for the Hewes legacy is still in force, and, in strictness, therefore, am not in a situation to declare whether, upon the hearing of that question, the personal representative of Mrs. Hewes' estate should be made a party; but if the Massachusetts statute is accurately quoted by counsel, it would seem that, if the claim of the Hewes children is well founded, they would take, not as representatives of their mother, but as persons substantively entitled, because of her death, to the \$5,000 legacy (Cook v. Munn, 12 *Abb. N. C.*, 344).

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HANOVER V. REYNOLDS.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—March, 1886.

## HANOVER v. REYNOLDS.

*In the matter of the judicial settlement of the account of FREDERICK T. REYNOLDS, as administrator, and LAURA D. STAAB, as administratrix of the estate of EGBERT B. MACK, deceased.*

An attorney having stipulated, for a consideration mentioned, "to give his legal services as the counsel or attorney of the administrators in the settlement of (decedent's) estate, until the same is settled,"—the administrators agreeing that he should be repaid for "any and all disbursements made necessary on the settlement;"—on a motion for substitution, the former claimed to be reimbursed for \$250 paid by him for services of counsel in the estate affairs.—

*Held*, that the *disbursements* contemplated were those enumerated in Code Civ. Pro., § 3256; among which the one in question did not fall.

MOTION for substitution of attorney of administrators. The facts are stated in the opinion.

C. W. MOULTON, and B. P. RYAN, for administrator.

CHAS. G. BENNETT, for administratrix.

THE SURROGATE.—On behalf of the administratrix of this estate, a motion has been made for the substitution of Mr. Bennett in the place of Mr. Hanover, as her attorney in the pending accounting proceeding. Mr. Hanover claims that, as a condition of such substitution, he should first be paid \$275, disbursed by him on account of his client.

It appears that, in January, 1882, he entered into a

written contract with the administratrix, whereby, in consideration of the transfer of the good will, etc., of a certain advertising agency that had belonged to the decedent in his lifetime, he (the attorney) agreed, among other things, "to give his legal services as the counsel or attorney of the administrators in the settlement of said estate until the same is settled." The agreement further provided that the attorney should be repaid for "any and all *disbursements* made necessary in the settlement of said estate." It is under the clause last quoted that the attorney of record herein has interposed his claim for \$275 disbursements, which includes a claim of \$250 paid by Mr. Hanover as compensation for legal services of counsel in the affairs of the estate.

I think that, as regards the enforcement of an attorney's lien, this term, "disbursements," must be taken in its technical meaning, and confined to such disbursements as are set forth in § 3256 of the Code of Civil Procedure. The sum paid by the attorney for services of counsel is not a disbursement within that section, and is not a disbursement, therefore, for the repayment of which the lien of the attorney of record can be recognized, or his claim for refunding sustained. If the other disbursements, to the amount of \$25, are such as are embraced in § 3256, the payment of that sum may be directed as a condition to the entry of an order of substitution.

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MATTER OF COLLES.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—March, 1886.

MATTER OF COLLES.

*In the matter of the estate of JAMES COLLES, deceased.*

The court will not seek to restrain, within the limits prescribed by our statute, the commissions of an executor accountable both here and in a court of another state, in view of the possibility that the other court might not coincide.

TESTATOR died at Morristown, New Jersey, in November, 1883, having dwelt there for six years previous. His will was there proved, and letters testamentary issued to George W. Colles, in December of the same year. Testator left real property in New York county, where the will was again proved in August, 1884, and letters testamentary were issued by the Surrogate of that county to the same executor. The appraisal and inventory were made under the authority of the New Jersey court, and the estate was in part administered. Proceedings were also instituted in New Jersey, by the executor, for the passing of his accounts. Thereafter certain of the legatees asked for an accounting here.

EDWARDS & ODELL, for executor :

The sole question is—by what law shall the commissions be determined. In other words, how shall “the ownership and disposition” of the small balance in the executor’s hands be determined. How

much shall be given to the executor as compensation, and how much shall pass to the legatees. The claim is made that, because the property is within this State, it must be distributed, *i. e.*, "the ownership and disposition be determined" by the law of this State. But this is the reverse of what is declared by Code Civ. Pro., § 2694.

DEFOREST & WEEKS, *for petitioners*:

The bulk of the estate, at testator's death, was in New York. All the distributees, except the executor, are citizens of New York. The whole estate has been distributed in the city of New York, except a few thousand dollars still remaining in the executor's hands. The testator's domicil is in question, on admitted facts. There are no creditors.

THE SURROGATE.—In asking that the respondent be directed to render an account, for judicial settlement by the Surrogate of this county, the petitioners declare that they have no other object than to restrain the allowance of commissions to the executor within the limits fixed by the statutes of this State. They claim that, if the proceedings for accounting now pending in New Jersey should be pushed to a conclusion, and if the compensation of the executor should be fixed by the Orphans' court of Morris county, he might be granted a larger sum than would be here awardable.

I have grave doubts whether a compliance with the petitioner's application would practically result in any saving of administration expenses. The New Jersey court, in which the executors accounting pro-



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SAUTER V. MULLER.

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ceeding is now pending, would not be bound to dismiss it, and, very likely, would not be disposed to dismiss it, in deference to any adjustment that might here be made. Under all the circumstances, it seems to me that the rights of all parties interested can be best ascertained and determined in New Jersey. Indeed, I am inclined to think that, at the conclusion of any accounting proceedings that might be instituted, it would be proper to direct the transmission of all undistributed assets to New Jersey, and to remit all parties interested to the Orphans' court of Morris county, for the determination of any controversy respecting the executor's commissions.

I am not disposed to dismiss this petition, but if the petitioners do not care to press it, I will permit it to be withdrawn.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—April, 1886.

## SAUTER v. MULLER.

*In the matter of the estate of AGNES SAUTER, deceased.*

Under a bequest to one for life, with remainder over, if the particular beneficiary die before testator, the remainder takes effect at the latter's death.

This rule applies, although the will gave trustees a discretion to devote the entire principal to the use of the life legatee.

CONSTRUCTION of decedent's will, upon judicial

settlement of account of Christian F. L. Müller, sole surviving executor thereof.

CHARLES MUEHLING, *for executor.*

S. ZELLER, *special guardian.*

THE SURROGATE.—The fourth article of the will of this testatrix is as follows :

“ All the rest, residue and remainder of my property . . . . I give and bequeath to my children, Anna, Maria, John, Agnes and Henry, in equal parts, share and share alike, in the following manner: One fifth to my daughter Anna absolutely forever; one fifth to my daughter Maria absolutely forever; one fifth to my son John absolutely forever; one fifth to my daughter Agnes absolutely forever. The remaining one fifth shall be deposited . . . . in trust for my son Henry, who shall, during his natural life, receive the interest accruing on such deposit. Should it, however, in the judgment of my executors, at any time become necessary for the support of my son Henry to use more money than the accrued interest aforesaid, then in such case my said executors are hereby empowered to pay over any part or all of said principal to my son Henry. . . . . Should, however, at the decease of son Henry, any part of the moneys so reserved for him be left over, then such remainder, after deducting his funeral expenses, shall be divided equally among my four children, or the survivors of them.”

Henry Sauter died intestate in the lifetime of the testatrix, leaving him surviving no children or other descendants, but leaving two nephews, the children

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SAUTER V. MULLER.

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of Louis, who died before the execution of this will. Are those nephews entitled to any portion of the one fifth of the residue of this estate in which their uncle Henry was interested in his lifetime?

It is clear that, if the testatrix had made no provision for the disposition of that one fifth at Henry's death, the legacy, by reason of his dying in her lifetime would have lapsed, she would as to such one fifth have died intestate, and the children of her son Louis would have become entitled to share therein as her next of kin. But such is not the posture of affairs.

“In the case of a legacy to a legatee for life with remainder to another legatee,” says Mr. Williams in his treatise on the law of executors (vol. 2, p. 1219), “if the tenant for life dies before the testator, the remainder over takes effect upon the testator's death.” This is a well settled doctrine (*Mowatt v. Carow*, 7 *Paige*, 328, 338; *Taylor v. Wendel*, 4 *Bradf.*, 324).

In the case at bar, there is no repugnance between the provision for Henry Sauter and the gift over, by reason of the fact that, in the exercise of their discretion, the executors would have had authority, in case Henry had survived his mother, to devote the entire principal of one fifth of the residue to his use (*Fernbacher v. Fernbacher*, *ante*, 227, and cases cited; *Terry v. Wiggins*, 47 *N. Y.*, 512; *Flanagan v. Flanagan*, 8 *Abb. N. C.*, 413; *Smith v. Van Ostrand*, 64 *N. Y.*, 278; *Thomas v. Pardee*, 12 *Hun*, 151).

I hold, therefore, that the entire residuary estate of the testatrix is effectually disposed of by the will, and that the children of her son Louis have no interest therein.

MATTER OF BETHUNE.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—April, 1886.

MATTER OF BETHUNE.

*In the matter of the application for probate of the will of JOHN C. BETHUNE, deceased.*

One asserting herself to be the widow of a decedent, and her title as such to intervene in proceedings instituted to procure probate of a paper propounded as his will, may show, in the Surrogate's court, that a prior marriage did not disqualify her to become decedent's wife, by reason of the same having been void *ab initio*.

APPLICATION by Elise Bethune, for leave to intervene in a special proceeding instituted for the probate of decedent's will.

J. V. B. LEWIS, *for applicant*.

J. H. HILDRETH, and S. T. SMITH, *for proponents*.

THE SURROGATE.—It is provided, by Code Civ. Pro., § 1774, that, in certain classes of actions, including actions to annul marriage, final judgment shall not be rendered against a defendant, upon his default in appearing or pleading, where he has been personally served with a summons without the State, unless upon the face of the summons so served these words, or words of similar purport, appeared legibly written or printed—"Action to annul a marriage."

Section 1774 further provides that the affidavit proving service of such summons "must affirmatively state that an inscription (setting forth a copy thereof)

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MATTER OF BETHUNE.

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was so written or printed upon the face of the copy of the summons so served." The affidavit of service, which forms a part of the judgment roll in the action brought by this contestant to annul her marriage with one Stutzbach, fails to make the statement above required. The affidavit of service, which was subsequently allowed to be filed *nunc pro tunc*, also fails to show that the copy bore the inscription which the statute demands. For these defects the court which pronounced the decree in question was without jurisdiction, and such decree must be treated, for the purposes of this proceeding, as inoperative and void.

It is fatally defective also for another reason. The order directing the service of the summons by publication or personal service without the State, was based upon the allegation of the defendant's non-residence. To justify the granting of such an order, it was essential that proof should have been made by affidavit that the plaintiff had been unable, and would be unable, with due diligence, to make personal service of the summons within the State (Code Civ. Pro., § 439). Such inability was not alleged in the affidavit which was used as the basis of Judge LARREMORE's order. That this is a fatal defect, see *Wortman v. Wortman* (17 *Abb. Pr.*, 66); *Greenbaum v. Dwyer* (4 *Civ. Pro. Rep.*, 276); *Bixby v. Smith* (3 *Hun*, 60); *Wunnenburg v. Gearty* (36 *Hun*, 243); *Kennedy v. N. Y. Life Ins. Co.* (32 *Hun*, 35); *Carleton v. Carleton* (85 *N. Y.*, 313).

Although the decree which this contestant has invoked as establishing her capacity to contract a marriage with this decedent is ineffectual for that purpose, she will be afforded an opportunity to show, if

she can, that, at the time of such marriage, she was under no disability by reason of her previous marriage with Otto Stutzbach, but that such previous marriage was altogether void.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—April, 1886.

CORN v. CORN.

*In the matter of the estate of ABRAHAM CORN, deceased.*

In order to justify a revocation of letters of administration, or of general guardianship, upon the ground that the same were "obtained by a false suggestion of a material fact" (Code Civ. Pro., § 2685, subd. 4; id., § 2832, subd. 4), it must be made to appear that the suggestion was made to the tribunal by which the letters were granted.

Whether co-administrators can lawfully enter into an agreement, which the court is bound to recognize, whereby one of them is to have the exclusive care and custody of their decedent's estate—*quære*.

PETITION for the revocation of letters of administration, and of guardianship. The facts appear in the opinion.

CARDOZO & NEWCOMBE, *for petitioner*.

A. R. DYETT, *for respondent*.

THE SURROGATE.—This decedent died in November, 1885, leaving his widow, Annie Corn, and his infant child, Percival Corn, him surviving. On January 5th, 1886, letters of administration were granted,

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CORN V. CORN.

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upon the widow's petition, to herself and to Samuel Corn, the father of the decedent. On the same day also, in accordance with Mrs. Corn's petition, Samuel Corn was granted letters of guardianship of the person and estate of her infant son. She now asks the Surrogate to revoke those letters of guardianship, and to revoke also the letters of administration so far as they confer any authority upon this respondent.

Mrs. Corn alleged in her petition that, on or about January 3rd, 1886, the respondent advised her that "under the law it was necessary" that two administrators should be appointed for taking charge of her husband's estate, and two guardians for protecting the interests of her child. She alleges further that the respondent told her that he had made arrangements for the appointment of himself and her as joint administrators and guardians; that accordingly, at respondent's request, she went to the office of his counsel, Mr. Dyett, and subsequently to the Surrogate's office, and signed certain papers which she supposed to relate to the appointment of the respondent and herself as such guardians and administrators.

It appears by her petition that, on the 5th of January, 1886, Mrs. Corn entered into a certain written agreement with the respondent under a misapprehension, as she claims, respecting its true nature and effect. A copy of that agreement is annexed to the petition. It substantially provides that administrator Corn shall have the sole care and custody of all the property of the estate until the distribution thereof, according to law, and recites that such authority had been yielded to him by the petitioner, because of his

furnishing the sureties upon the administration bond, petitioner herself having been unable to procure the requisite security for her own appointment as sole administratrix. The petitioner insists that these recitals are false; that she was not informed before signing the agreement, and, when she executed it, did not in fact understand, that she was virtually surrendering to the respondent the exclusive possession and control of the property of the estate.

The opposing affidavits of the respondent allege that the agreement in question was drawn in duplicate after consultation between himself and the petitioner, and that the latter read it before execution; that at Mr. Dyett's request she also read the petition for the appointment of herself and the respondent as administrators, and that she took the same course in respect to the petition for appointment of the respondent as guardian of her son. Mr. Corn denies that he ever said to the petitioner that two guardians or two administrators were required by law.

It appears from the affidavit of Mr. Dyett that he prepared for execution the agreement and the two petitions; that he was present when Mrs. Corn signed the three papers; that he explained to her their contents and handed them to her for examination; that she apparently read them through, and afterwards signed them without any protest, and without suggestion that she did not thoroughly understand what she was doing.

The Surrogate's authority to revoke letters of administration is solely derived from section 2685 of the Code of Civil Procedure (*O'Brien v. Neubert*, 3 *Dem.*,



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CORN V. CORN.

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156). It cannot be claimed that the allegations of the petition in the case at bar would justify revocation under any of the subdivisions of that section except subd. 4. Now, can I find upon the proofs before me that the letters here in question were "obtained by a false suggestion of a material fact?" This expression first came upon the statute book at the adoption of the Code. The law previously in force applicable to this subject (L. 1837, ch. 460, § 34; 3 Banks, 5th ed., 164) provided that letters of administration might be revoked whenever it should appear to the Surrogate that they had been issued "on or by reason of false representations made by the person to whom the same were granted." For that provision the one here invoked was substituted, to cover such cases as were referred to by the Supreme court in *Proctor v. Wanmaker* (1 *Barb. Ch.*, 302; see THROOP'S Code, note to § 2685).

In *Proctor v. Wanmaker*, it was held that, independently of the statute of 1837, the Surrogate had power to revoke letters of administration where there had been a *false suggestion* of a material fact or a lack of notice to the parties rightfully entitled to administration. The cases cited by the Supreme court in support of that proposition were all cases in which letters had been revoked upon a discovery that false representations had been made *to the tribunal by which such letters had been granted*, or that from such tribunal the lack of proper notice had been concealed. See *Cornish v. Cornish* (1 *Lee Ecc.*, 14); *Burgis v. Burgis* (*id.*, 121); *Drummond v. Hamilton* (*id.*, 357);

Smith v. Corry (*id.*, 418); Lord Trimlestown v. Lady Trimlestown (3 *Hagg. Ecc.*, 243).

Now, even upon the petitioner's own showing, I cannot find that the respondent obtained his letters by any false suggestion to the Surrogate of a fact material to the proceeding for the appointment of administrators. The petition must, therefore, be denied. It is not my intention, in so denying it, to pass upon any question as to the validity or effect of the agreement above referred to between the parties to this proceeding. Whether that is such an agreement as administrators may lawfully enter into, and as courts are bound to recognize, may hereafter become the subject of consideration, but need not now be determined.

I had occasion, in deciding *Ledwith v. Union Trust Co.* (2 *Dem.*, 439), to review the grounds upon which the Surrogate is authorized to remove a guardian appointed, as was this respondent, by virtue of title 7, ch. 18 of the Code of Civil Procedure. I adhere to the conclusion there announced, that, as respects the guardianship of an infant's estate, the Surrogate can not revoke letters, even though such revocation would seem to be for the best interests of the infant, unless facts are established which constitute a sufficient ground for revocation within one or more of the first five subdivisions of § 2832 of that Code. No such facts have been established in the case at bar. I do not discredit Mrs. Corn's allegation that, when she signed the petition asking for the respondent's appointment as guardian, she supposed that she herself would also be granted letters, and accordingly, if such

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VOGEL V. ARBOGAST.

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a course could properly be pursued, I would now direct that she be associated with the respondent in the guardianship. But I have no power to give such a direction. It would be gratifying to the court if the respondent should pursue the course which his counsel, at the argument of this proceeding, declared would meet with his approbation—that is, to resign the guardianship and consent to the grant of new letters to himself and the petitioner. If he shall not see fit to adopt this course, a decree may be entered removing him from his office as guardian of the infant's person; for if the relations between the petitioner and the respondent are to be inharmonious, the infant's welfare will, in my judgment, be promoted by substituting the former for the latter as his personal guardian.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—April, 1886.

VOGEL *v.* ARBOGAST.

*In the matter of the estate of PHILIP ARBOGAST, deceased.*

The statutes (2 R. S., 82, § 2, *et seq.*, and Code Civ. Pro., § 2715) regulating the proceedings for the preparation and return of inventories, do not contemplate interference, by legatees or next of kin of a decedent, with the action which executors and administrators, aided by appraisers, are required to take.

The proper practice, under Code Civ. Pro., is to postpone, until an account-

ing, all disputed questions respecting the existence or valuation of a decedent's assets.

Therefore, where, after the entry, upon the application of administrators, of an order directing an appraisal of such of decedent's assets as had come to their knowledge, the next of kin asked that they be required to produce certain papers for the assistance of the appraisers, and the administrators alleged that they had already submitted to the appraisers a true and full statement of all the assets,—

*Held*, that the issues thus raised could not then be brought to trial, and that the relief sought should be refused.

MOTION by Julia Vogel and others, next of kin of decedent, for an order directing George P. Arbogast and others, administrators of his estate, to produce papers on appraisal.

A. J. DITTENHOEFER, *for the motion.*

HAL BELL, *for administrators.*

THE SURROGATE.—Upon the application of the administrators of this estate, the Surrogate lately made an order directing an appraisal of such assets left by the decedent as had come to the knowledge of the applicants. A motion is now made on behalf of certain of the next of kin for an order directing the administrators “to produce on the appraisal all the papers of said deceased, of any nature whatever, and especially any list of personal estate which the decedent may have left in his safe, and any paid up checks returned to deceased by his bank of deposit, or any check books, in order that the appraisers may, by examining the same, determine the amount of the assets of the estate and the amount of advancements made by the deceased to his children and children in law.” The various allegations contained in the papers

presented by the moving parties in support of their application are denied in the answering affidavits submitted by the respondents. The administrators expressly declare that they have already submitted to the appraisers a true and full inventory and statement of all assets, moneys, mortgages, stocks, bonds, claims and demands belonging to the estate.

Under these circumstances I must decline to grant the order prayed for. It is not contended by the applicants for that order that there is any express provision of statute which requires or authorizes the Surrogate to make it. The written laws which regulate the proceedings for the preparation and return of inventories do not seem to contemplate any interference by legatees or next of kin with the action which executors and administrators aided by appraisers are required to take.

The representative of the estate must act upon his own responsibility, and under the sanction not only of his official oath, but of a special oath which he is required by law to take in verification of the accuracy of his inventory. It is manifest that the granting of this motion would be of no legitimate practical advantage to the applicants, unless it would enable them to try issues with the respondents respecting the correctness of such inventory as may hereafter be filed. Can such issues be brought to trial?

The statutory provisions pertinent to this subject may be found in title 3, chapter 6, part 2, of the Revised Statutes (3 Banks, 7th ed., 2293), and in § 2715 of the Code of Civil Procedure. By § 2 of the title above named, every executor or administrator is en-

joined, within a reasonable time after qualifying, to make—with the aid of appraisers appointed by the Surrogate—a true and perfect inventory of all the goods, chattels and credits of his decedent.

Section 4 provides that the appraisers shall take and subscribe an oath that they will truly and impartially appraise the personal property which shall be exhibited to them.

Section 5 directs that the appraisers shall, at a time and place previously fixed upon and proclaimed, proceed to estimate such property, and to set down each article thereof in the inventory with a statement of its value.

Section 16 requires that the inventory returned by the executor or administrator shall be verified by the oath of its maker that it is “in all respects just and true,” and “contains a true statement of all the personal property of the deceased which has come to the knowledge of such executor or administrator.”

By § 2715 of the Code, a creditor or person interested in a decedent's estate may present to the Surrogate's court proof by affidavit that its executor or administrator has failed to return an inventory or a sufficient inventory, and, if the Surrogate is satisfied that such executor or administrator is in default, he must make an order requiring the delinquent to return such inventory, or such further inventory, as the case may be.

The section of the Code above cited is, so far as concerns the matter now under discussion, a mere consolidation of certain repealed provisions of title 3, *supra*, and has not in any manner enlarged the respon-

sibilities of executors and administrators; or the rights and privileges of creditors, legatees or next of kin, as regards the making and filing of inventories (THROOP's Code, § 2715, note; Matter of McIntyre, 4 *Redf.*, 489; Greenhough v. Greenhough, 5 *Redf.*, 191).

Now, before the enactment of the Code, it was settled by numerous decisions that a sworn inventory could not, in a proceeding, for that purpose, be falsified; that when its maker came to his accounting, it was competent for the parties in interest to prove that he had not charged himself with all the property that had reached or should have reached his hands, or with the true value thereof; but that the Surrogate was not authorized to receive evidence impeaching an inventory, which, in the face of allegations tending to dispute its correctness, the executor or administrator had under oath pronounced to be just and true (Thomson v. Thomson, 1 *Bradf.*, 24; Montgomery v. Dunning, 2 *Bradf.*, 220; Waring v. Waring, 1 *Redf.*, 205; Sheerin v. Public Adm., 2 *Redf.*, 421).

In Thomson v. Thomson (*supra*), Surrogate BRADFORD, after a careful review of the procedure of the English ecclesiastical courts, declared the rule to be well established, that those courts, while they would entertain an application for a corrected or additional inventory, would not, in case the accuracy of the inventory already filed were reasserted on oath by the executor or administrator, receive evidence tending to falsify it. It was only in case the allegations of the applicant for a new or amended inventory were admitted or were not disputed that the courts

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MATTER OF HOUSMAN.

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would order the filing of another. By the English practice, an inventory was required, as it is here required by statute, to be verified by the oath of the executor or administrator. It could not, therefore, be received without such verification, and manifestly its maker could not be compelled to swear to the truth of an amendment or addition which in substance he had twice denied under oath. The only course, therefore, was to postpone until the period of accounting all disputed questions respecting the existence of assets or their valuation. It might then be shown that property had been omitted from the inventory which ought to have been included therein, and that assets had yielded or should have yielded a larger sum than the value at which they had been appraised.

This I hold to be the proper practice under the Code. Motion denied.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—April, 1886.

## MATTER OF HOUSMAN.

*In the matter of the estate of SARAH HOUSMAN, deceased.*

Decedent's will gave the residue of her real and personal estate, including a dwelling house, to the executors, in trust to pay the net income to designated beneficiaries for life, and distribute the principal upon the death of the latter. The executors having, of their own motion, taken out policies of insurance of the house mentioned, which, in fact,



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MATTER OF HOUSMAN.

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enured to the protection both of the equitable life tenants and of the remaindermen,—

*Held*, that the charge for the premiums should be apportioned between the two classes of beneficiaries, according to the values of their respective interests, as determined by the Northampton tables.

Peck v. Sherwood, 56 N. Y., 615—followed.

Where a will limits a gift of general residue in successive estates, the first taker, unless an intent appears that he should enjoy the subject *in specie*, is not entitled to the annual proceeds of such property as may be held by the executors; but the property is to be treated as if converted and capitalized, so as to allow such taker the annual income that would be yielded by such capital, and to preserve the latter to meet subsequent claims under the settlement.

The will, which directed a conversion of the entire property, provided that, until this was effected, the executors should “receive the rents, interest and income thereof,” and pay and apply them, as required with respect to interest and income of proceeds of sale. The executors retained, for several years, household furniture belonging to the estate, and let the same with the house in which it was contained, this course being obviously for the advantage of the life beneficiaries.—*Held*,

1. That the executors were justified in retaining annually a portion of the income, to meet a prospective loss, by depreciation, upon the sale of the furniture.
2. That, upon such sale, a sum equal to the depreciation should be transferred from income to capital account, provided that the life beneficiaries would thus receive as much income as if the furniture had been promptly converted, and the house let vacant.

HEARING of exceptions to report of referee to whom were referred the account of the executors of decedent's will, and objections thereto, filed in proceedings for judicial settlement.

JOHN T. LOCKMAN, and CHARLES JONES, *for executors*.

ROGER FOSTER, *special guardian for infant objectors*.

THE SURROGATE.—This testatrix, by the seventh article of her will, devised and bequeathed to her executors the rest, residue and remainder of her estate, real and personal, upon the trust following: “To sell and dispose of all my real estate at public auction, or

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MATTER OF HOUSMAN.

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by private contract, at such time or times and in such manner and upon such terms as my said executors shall think proper, and to convert all my personal estate into money, and divide the net proceeds of said real and personal estate into seven equal shares." Direction is then given by the will for the distribution of the net income and interest arising from these several investments among certain specified beneficiaries for life, and for the distribution in each case of the principal funds, as those life interests shall respectively terminate.

The eighth clause of the will directs that, until the sale and disposition of the real and personal estate, the executors shall "receive the rents, interest and income thereof," and shall "pay and apply the same in the manner and proportions above directed with respect to the interest and income of the proceeds thereof."

The testatrix died in 1877. In November, 1878, the executors presented their first account, which was judicially settled by a decree entered on March 22nd, 1879. Their second account was filed in July last, and objections having been interposed, the issues were submitted to a referee, whose report is now before me on a motion for its confirmation. Two exceptions are urged by the accounting parties to the referee's findings. They are as follows:

*First.* The executors expended the sum of \$156.50 for seven years' fire insurance on premises belonging to the estate at No. 46 west twenty-fifth street. This item appears in the account as a charge against income exclusively. The referee declares it as his opin-

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MATTER OF HOUSMAN.

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ion that, if the insurance premiums had been paid out of the principal estate as the policies were from time to time renewed, the sum thus expended would have fairly apportioned itself between the remaindermen and the life tenants, the prospective income of the latter being in this way equitably reduced from year to year by a reduction of the sum from which such income was derivable. The referee holds, accordingly, that this item of \$156.59 has no place in the income account, but should be charged wholly to principal.

I have made a careful search for judicial decisions upon the question of the propriety of apportioning the cost of fire insurance as between life tenant and remainderman, or as between the two beneficiaries of a trust fund, one of whom is entitled to the income for life, and the other to the principal at the termination of the life interest. There are very few reported cases in which this question has been considered, but it seems to me to have been squarely determined in *Peck v. Sherwood* (56 *N. Y.*, 615). The Court of Appeals there decided that, where one who held, under a testator's will, a life tenancy in certain premises had expended moneys for insurance thereon, he was entitled to contribution from the executor of the estate—such executor being a person who upon the life tenant's death would take such premises, as devisee in trust of the remainder.

It is claimed by the exceptors herein that the case at bar is distinguishable from that just cited in this respect; that here neither the beneficiaries of the income nor those of the principal have any insurable

interest as such in the property insured, while in *Peck v. Sherwood* both the life tenant and the remainderman had separate legal estates upon which each might have obtained separate insurance.

I am by no means clear that the distinction thus suggested is a true one. In his treatise on Trusts (3rd ed., § 553), Mr. Perry says: "Both the equitable tenant for life and the remainderman have an insurable interest in the trust estate; and if one insures his own interest in the buildings and they are burned, neither can call upon the other for any part of the insurance money."

But assuming that, in the case at bar, the *cestuis que trustent* for life and those in remainder are, each and all, without insurable interest in the property, it seems to me that the doctrine of *Peck v. Sherwood* is for that very reason applicable with all the greater force. For in that case the remainderman might well have said to the life tenant: "You have of your own accord, and not at my request or with my sanction, seen fit to expend moneys for the insurance of my property, and that too when your own interests therein could, without resort to such a course, have been effectually protected. I owe you nothing." On the other hand, if these accounting executors can justly claim to be reimbursed for the sums expended by them in insuring their interest as trustees in the twenty-fifth street property, it must be upon the theory that the procurement of such insurance was necessary or desirable for the protection of the interests of all the *cestuis que trustent*. It might have been possible for the executors to have thus pro-

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MATTER OF HOUSMAN.

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tected the interests of the equitable life tenants only, or of the equitable remaindermen only. They seem to have thought proper to protect all; and it is but just, therefore, that the necessary expense of that protection should be met by all, in the ratio of their respective interests.

I again quote Perry on Trusts (§ 553): "The trustee has an insurable interest in the buildings upon the trust estate, and if he insures and the buildings are entirely destroyed by fire . . . . the tenant for life and the remainderman will receive their respective rights and interests" (*i. e.*, in the proceeds of insurance) "according to the terms of the settlement."

Judge FOLGER did not, in *Peck v. Sherwood*, lay down any definite scheme of apportionment. He simply declared that the remainderman should contribute "a proper portion of the sum paid for premiums." I am informed by Surrogate COFFIN that the course actually pursued in that case was to ascertain the life tenant's interest in the insured property according to the Northampton tables, and taking the difference between that sum and the total value of the property as the interest of the remainderman, to make the apportionment upon that basis. That mode of calculation may be adopted here.

*Second.* The other exception of the executors relates to the refusal of the referee to sanction the transference from income to capital of a sum equal to the amount of depreciation in the value of certain furniture held by them as part of the residuary trust estate. This furniture was in use by Mrs. Housman at the time of her death at her residence, No. 46 west

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MATTER OF HOUSMAN.

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twenty-fifth street, in this city. The executors still retain those premises, having never been able, as they state in their account, to sell the same for what they have deemed a fair price. At the time of their first accounting in November, 1878, they reported to the Surrogate that in their judgment it had theretofore been and still was for the best interests of the estate to rent that property furnished, rather than to rent it unfurnished, and to sell the furniture. The special guardian of a lunatic party in interest insisted that such sale ought to be at once effected. The views of the executors in this matter were sustained by an auditor to whom the accounts were submitted by the Surrogate. A decree was entered on March 22nd, 1879, upon the coming in of the auditor's report, which contains this provision: "And it appearing from schedule B, No. 1 of the account, . . . . that an immediate distribution of certain of the personal property mentioned in such schedule is not at the present time desirable, it is ordered that the executors retain" (among other things) "the following assets: Household furniture inventoried, \$1,991.50."

I think that the evidence supports the claim, made by the executors in schedule B, of the account here in controversy, that they have obtained, by letting the furniture with the house, \$2,500 more rent than they could have obtained by letting the house unfurnished. Meantime, the furniture has, of course, been greatly depreciating in value, and, according to the testimony of Mr. De Waltearrs, is worth to-day only about one half what it was worth at the time of the appraisal on the former accounting. The evidence

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MATTER OF HOUSMAN.

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satisfies me, however, that if it should be sold at its present appraised value, and if, out of income that the executors have from time to time retained to cover its depreciation, the amount of that depreciation were to be turned over to the *corpus* of the estate, the *cestuis que trustent* for life would be found to have received larger revenues than they would have obtained from the rents of the house unfurnished, together with the income that could have been derived from the proceeds of the furniture itself. The referee has held that, as the beneficiaries under the will were all parties to the former accounting proceeding, they are bound by the decree that the furniture should be retained as part of the residuary estate; that, under the seventh and eighth clauses of the will, the life tenants are entitled to the total income of the residue, and that, therefore, the depreciation of \$996.25 ought not to be charged in whole or in part against such life tenants. To this finding the executors except.

Unless there is some strict rule of law which necessitates the conclusion of the referee, or unless the remaindermen are estopped by the decree of March 22nd, 1879, from claiming credit on account of this depreciation, it seems but just that the depreciation should be made good out of the enhanced rental arising from the use of the furniture; otherwise the beneficiaries for life get all the advantage of the course pursued by the executors, and those in remainder suffer all the loss.

I do not agree with the referee in the opinion that the matter has already been adjudicated by the de-

cree on the former accounting. The decree did not, it is true, direct that the income account should be charged with the depreciation of furniture ; but, on the other hand, it did not direct that the loss by that depreciation should fall upon capital. It gave no direction in the premises whatever. Its sole effect was to absolve the executors from personal liability in case the retention of the furniture and the renting it with the house should prove to be an unprofitable venture.

If the executors had never, until now, presented an account for settlement, and if the parties hereto had not been parties to the proceeding which terminated in the decree of 1879, I can conceive of no situation which would more clearly call for the application of the doctrine respecting the apportionment of the interests of life tenants and remaindermen, which is referred to in the decision of the Surrogate of this county in the Matter of Kendall (*ante*, 133). The doctrine is this: That where a testator has limited a gift of general residue in successive estates, the first taker is not to have the annual proceeds of such property as may be held by the executors *in specie*, but such property must be treated as if converted and capitalized, so as to allow the first taker the annual income that would be yielded by such capital, and to preserve the capital itself to meet subsequent claims under the settlement. The rule is subject to this exception, that where from the whole will it appears that the testator intended that the first taker should enjoy the subject of the gift *in specie*, he should be permitted to do so, even though that course might



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MATTER OF HOUSMAN.

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ultimately deprive the person entitled in remainder of any advantage whatsoever.

The doctrine is thus stated in the recent case of *Macdonald v. Irvine* (*L. R.*, 8 *Ch. Div.*, 112): "Where there is a residuary bequest of personal estate to be enjoyed by several persons in succession, a court of equity, in the absence of a contrary intention, will assume that it was the intention of the testator that the legatees should enjoy *the same thing* in succession, and, as the only means of giving effect to such intention, will direct the conversion, into permanent investments of a recognized character, of all such parts of the estate as are of a wasting or reversionary character, and also of all such other existing investments as are not of the recognized character, and are consequently deemed to be more or less hazardous."

In such cases, therefore, if property which ought to be converted is held by executors, a tenant for life is not entitled to the annual produce, but to interest at some fixed rate upon the estimated value of the unconverted property or upon the value as it may be subsequently ascertained.

The principle thus enunciated has never, so far as I have discovered, been disapproved by the courts of this State, and is expressly sanctioned by *Covenhoven v. Shuler* (2 *Paige*, 122); *Cairns v. Chaubert* (9 *id.*, 160); *Spear v. Tinkham* (2 *Barb. Ch.*, 211); *Lawrence v. Embree* (3 *Bradf.*, 364).

Now, I repeat that the only effect of the decree of 1879 was to exonerate these executors from liability for their failure, up to the date of their first accounting, to sell the furniture in question, and for their re-

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MATTER OF HOUSMAN.

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tention of such furniture for some unspecified period in the future. But that the decree has had the effect of practically transforming the decedent's general disposition of the residue into a specific bequest to the life beneficiaries of the use of the furniture I cannot believe. I am bound, it seems to me, upon a fair construction of that decree, and of the will itself, to apply the doctrine above referred to as nearly as may be, and accordingly to hold that whenever the furniture shall be sold, a sum equal to the depreciation in its value *since November 14th, 1878* (the day to which the former accounting was brought down), shall be transferred from income to capital, *provided*, that, by the adoption of such a course, the persons entitled to the income will still receive as large an amount as would have been obtained by them if the furniture had been promptly converted and the house rented without it.

If, on the other hand, the loss by depreciation in the value of the furniture, as ascertained upon its sale, shall prove to be greater than the enhancement of income by the retention of such furniture, the precise course that I have suggested will not be equitable, but in its place some scheme of apportionment will need to be substituted. As regards this question, therefore, the decree to be entered upon this accounting will simply contain a provision for the continued retention of the portion of the income already withheld, and for the retention, besides, of such reasonable sum out of future income as will suffice to make good the probable loss by depreciation in the value of the furniture.

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MATTER OF HOUSMAN.

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Delay in making the conversion directed by the will should not inure to the advantage of the beneficiaries for life as against the remaindermen, or to the advantage of the latter as against the former, but to the advantage of the estate as a whole, and the equities should be adjusted between the successive takers (*Beavan v. Beavan*, *L. R.*, 24 *Ch. D.*, 649, n.; *People ex rel. Cornell University v. Davenport*, 30 *Hun*, 177).

It was not the intention of the testatrix that such delay should result, as between the successive takers, in the enjoyment by any beneficiary of an advantage whereof a prompter conversion would have deprived him.

Let a decree be entered in accordance with this decision. It must not sanction the retention of any portion of the income to cover such depreciation as may have occurred between the death of the testatrix and November 14th, 1878. All the income received up to that time from the rent of the twenty-fifth street house seems to have been distributed, and the propriety of that distribution was adjudicated by the decree of 1879. That decree cannot now be disturbed.

STANLEY V. STANLEY.

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NEW YORK COUNTY. — HON. D. G. ROLLINS, SURROGATE.—June, 1886.

STANLEY v. STANLEY.

*In the matter of the estate of MARCUS C. STANLEY, deceased.*

Two persons, each asserting herself to be the widow of an intestate, and one of whom is a petitioner for the revocation of letters of administration already granted to the other, occupy the same position before the court, as regards proof of their respective claims to such *status*, as if they had simultaneously applied for appointment.

Where a relation nominally matrimonial is shown to have been in fact meretricious in its origin, it will be presumed to have continued such, in the absence of evidence that, somehow, somewhere and at some time, its character was changed.

For several years preceding the year 1857, decedent and A. cohabited in the city of New York, as if husband and wife. When the cohabitation began, the woman, A., was incapable of contracting marriage, she having a husband then living ; and after it ceased, decedent was formally married to B. The separation between decedent and A. was not attended with the circumstances naturally occurring in case of the severance of marital relations,—the latter having never attempted a vindication of her conjugal rights, until she procured letters of administration of his estate.—

*Held*, that A.'s relations with decedent, being illicit at the outset, must be presumed to have continued to possess that character until the marriage of the latter ; and that her letters of administration should be revoked.

*Hynes v. McDermott*, 91 N. Y., 451—distinguished.

PETITION by Emma L. Stanley, claiming to be decedent's widow, for the revocation of letters of administration issued to Eliza C. Stanley. The facts are stated in the opinion.

JOHN D. TOWNSEND, *for petitioner.*

IRA SCHAFFER, *for administratrix.*

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STANLEY V. STANLEY.

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THE SURROGATE.—This decedent died on the 9th of July, 1885. On the 15th of the same month, Eliza C. Stanley, claiming to be his widow, was, upon her own petition, appointed administratrix of his estate. Proceedings to revoke her letters as such administratrix were begun on July 24th, 1885, by Emma L. Stanley, who alleged, in her petition for such revocation, that she herself was the lawful wife of the decedent at the time of his death, and that, accordingly, she, and not the respondent, was entitled to administer upon his estate. Upon the filing of this petition, a referee was appointed to take testimony in the proceeding for revocation and to report the same to the Surrogate.

I am now to determine, upon such portion of the testimony returned by the referee as I have not directed to be stricken from the record upon the motion of one or the other of the parties hereto, whether it is the petitioner or the respondent who can lawfully lay claim, as the widow of this decedent, to letters of administration.

That Emma L. Stanley, the petitioner, was formally and ceremonially married to decedent on September 22nd, 1857, is beyond dispute. Her application must, therefore, be granted, unless I am justified in finding upon the evidence before me that, when that marriage was solemnized, the decedent was incapable of contracting the same, by reason of his having theretofore become and his then being the lawful husband of this respondent.

At some time prior to October, 1849, Eliza C. Stanley was married, and, for aught that appears, law-

fully married to one Richard Tombs. By a decree of the Court of Common Pleas of this county the two were in that month divorced upon the ground of the wife's adultery with Marcus Cicero Stanley. It is conceded, by the defendant in that action for divorce, that the cohabitation between herself and Stanley, which was undoubtedly continued for several years, began meretriciously while she was the lawful wife of Tombs. She testified before the referee in the present proceeding that, after she had given birth to a child, of whom Stanley was the father, she was informed by Stanley and by other persons whose names she was unable to specify, that Tombs was no longer living. She further testified that, after the receipt of this intelligence she was formally married to the decedent by Barnabas W. Osborne, then a police magistrate of this city. Her statements are very vague and unsatisfactory as to the date when this alleged marriage took place, and the claim that it ever did take place finds no support in the evidence apart from her own testimony. Mr. Osborne was produced as a witness by the petitioner. He swore that he had no recollection of ever performing such marriage ceremony, and was confident that he never did perform it. He gave, as a reason for this confidence, the fact that, as a police magistrate, he was rarely called upon to solemnize a marriage except as incident to bastardy proceedings, and that, as he was intimately acquainted with the decedent for many years before and after the time approximately fixed by the respondent as the date of her marriage, he could not, if he had solemnized it, have failed to remember the circumstance.

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STANLEY V. STANLEY.

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In addition to this testimony of Osborne, the petitioner introduced a deposition made by the decedent himself in 1878 in a proceeding brought under R. S., part 3, ch. 7, tit. 3, art. 5 (3 Banks, 6th ed., 662) for the perpetuation of testimony. In that deposition the decedent positively denied that any marriage ever took place between himself and this respondent, or that Osborne ever performed any marriage ceremony as the respondent had theretofore alleged. In this state of the testimony, it can hardly be claimed that the fact of such formal marriage has been satisfactorily established. I think it extremely unlikely that it ever occurred, and I find that it never did.

Counsel for the petitioner relies upon the case of *Hynes v. McDermott* (91 *N. Y.*, 451), as supporting his contention that, even if the respondent's claim of a formal marriage be discredited, a marriage in fact may and ought to be inferred from the relations proved to have existed between his client and this decedent prior to the latter's intermarriage with the petitioner.

That Stanley's cohabitation with the respondent was ostensibly matrimonial, both before and after the respondent's divorce from Tombs, I have no doubt. She passed as his wife at the various places where they resided, and that, too, with his knowledge and approval; and he is shown to have introduced her as such to divers persons who were examined before the referee. Indeed, in October, 1849, he himself swore, in the Tombs divorce proceeding, that, during the three years then last past, this respondent had lived and cohabited with him as his wife, and that, as the

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STANLEY V. STANLEY.

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fruits of that intercourse, she had borne two children, of whom one was then two months old and the other of the age of two years. How long this cohabitation between Stanley and the respondent continued after Tombs obtained his divorce is not definitely shown, but it had admittedly ceased altogether before Stanley married the petitioner. Now does its existence while it lasted, and the "habit and repute" which attended it, raise a presumption that prior to September 22nd, 1857, the decedent and Eliza C. Stanley were husband and wife ?

Hynes v. McDermott (*supra*) was an action of ejectment in which two children of one William R. Hynes and one Mary E. Hynes sought to recover certain premises whereof their father, who died intestate, had been seized at his death. Their right to recover depended upon the question whether their father and mother had sustained to each other the relation of husband and wife. The evidence showed that the two became acquainted in England, and for several years thereafter, and until Mr. Hynes died, lived in ostensible matrimonial cohabitation in that country. Neither of them was at any time under any disability which forbade a legal marriage with the other. They were never formally married and were, therefore, under the English law, never married at all. On one occasion they visited Paris, France, where their cohabitation continued, and where the woman was introduced by Mr. Hynes as his wife. No proof was given respecting the marriage laws of France, and it was assumed that, in that country as in this State, the agreement of a man and a woman to sus-



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STANLEY V. STANLEY.

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tain to each other the relation of husband and wife, followed by a cohabitation, constituted a marriage. The court of Appeals held that upon these facts the jury was authorized in finding, as it did, that the parties, by interchange of mutual consents, had actually contracted a marriage in France. "The presumption of marriage," said ANDREWS, J., pronouncing the opinion of the court, "from a cohabitation apparently matrimonial, is one of the strongest presumptions known to the law. This is especially true in a case involving legitimacy. The law presumes morality and not immorality, marriage and not concubinage, legitimacy and not bastardy. Where there is enough to create a foundation for the presumption of marriage, it can be repelled only by the most cogent and satisfactory evidence."

In considering how far this doctrine is applicable to the case at bar, I have been impressed by the fact that though several decisions of the courts of New York are cited in its support, no reference is made in *Hynes v. McDermott* to certain others which have a very important bearing upon the present controversy. The cases cited are *Fenton v. Reed* (4 *Johns.*, 51); *Rose v. Clark* (8 *Paige*, 574); and *Caujolle v. Ferrie* (23 *N. Y.*, 90). Those to which no allusion is made are *Clayton v. Wardell* (4 *N. Y.*, 230); *Brinkley v. Brinkley* (50 *N. Y.*, 198); *Chamberlain v. Chamberlain* (71 *N. Y.*, 423); *Collins v. Collins* (80 *N. Y.*, 9); and *Badger v. Badger* (88 *N. Y.*, 546). I do not understand that the doctrine asserted in these cases has been overthrown, if, indeed, it has been at all affected, by the decision of *Hynes v. McDermott*.

In *Badger v. Badger* (*supra*), FINCH, J., pronouncing the opinion of the Court of Appeals, said:

“The rule that a connection confessedly illicit in its origin will be presumed to retain that character until some change is established, is both logical and just. The force and effect of such a fact is always very great, and we are not disposed in the least degree to weaken or disregard it. Very often the changed character of the cohabitation is indicated by facts and circumstances which explain the cause and locate the period of the change, so that in spite of the illicit origin, the subsequent intercourse is deemed matrimonial; but a change may occur and be satisfactorily established, although the precise time or occasion cannot be clearly ascertained. If the facts show that there was, or must have been, a change; that the illicit beginning has become transformed into a cohabitation matrimonial in its character, it is not imperative that we should be able to say precisely when or exactly why the change occurred.”

It is not important to quote from the four other cases last above cited. They seem to sustain the principle that, where a relation nominally matrimonial is shown to have been in fact meretricious in its origin, it will be presumed to have continued meretricious, in the absence of evidence that somehow, somewhere and at some time its character was changed.

Now the case at bar is distinguishable from *Hynes v. McDermott*, and from every other case whose authority ANDREWS, J., invokes, as supporting that decision, in this notable particular, that here alone a question presents itself as to the effect of conflicting legal presumptions.

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STANLEY V. STANLEY.

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The fact that the respondent was more diligent than the petitioner in applying for letters of administration, and that letters have been granted pursuant to her application, manifestly does not put upon the petitioner any burden that she would not have been called upon to bear if both parties to this proceeding had simultaneously appeared before me as rival claimants for letters. Now, should either of these women be accorded the benefit of a legal presumption as against the other? Will it be said that the respondent is preferentially entitled thereto because her claim to be the decedent's wife is, in point of time, antecedent to that of the petitioner? This contention would rest upon a very palpable begging of the very question at issue, which is—*Was the respondent the decedent's wife at any time?* May not the petitioner invoke for herself and her children the kindly presumption with which the law surrounds one whose matrimonial *status* is assailed? And may she not, indeed, invoke it with even greater propriety and cogency than the respondent, seeing that the latter's connection with the decedent was admittedly illicit in its origin while he was united to the petitioner *in facie ecclesiæ* in a matrimonial relation which lasted for twenty-eight years and only ended with his life?

A., a woman, claims to have been married to B., a decedent, and to have borne him a child, C.; D., another woman, also claims to have been B.'s wife, and to have borne a child, E., of whom B. was the father. Will the law, in its anxiety to find A.'s morality and C.'s legitimacy, presume that C. was born in wedlock, when the indulgence of that presumption must of

necessity involve the immorality of D. and the illegitimacy of E.? Such a case would, indeed, fill to the full the measure of what Baron EYRE once characterized as "presumption run mad."

I cannot think that such a doctrine finds any support in the decision of *Hynes v. McDermott*. In his treatise upon Marriage and Divorce (vol. 1, § 434), Mr. Bishop says upon this subject: "Since people are not to be deemed, without proof, to be living either in crime or in violation of common decency and decorum, the law will presume every couple who dwell together, in the way of husband and wife, to be *prima facie* such in fact. This presumption will prevail in all cases where it is not overcome by evidence or neutralized by a presumption growing out of the special issue or proofs." And the same author, after further discussion of the matter, adds (§ 440): "In general, and by the opinions of most judges, if, while three persons are living, two of them cohabit matrimonially, and then, separating, one of them and the third do the same, no marriage in either instance will be presumed from such cohabitation and repute; but if the actual fact of marriage is proved as introducing either one of the cohabitations, it will not be invalidated by the evidence of the other."

To similar effect, see *Clayton v. Wardell* (4 *N. Y.*, 230, 237); *Jones v. Jones* (48 *Md.*, 391); *Breakey v. Breakey* (2 *U. C. Q. B.*, 349, 358); *Wheeler v. McWilliams* (2 *id.*, 77); *Case v. Case* (17 *Cal.*, 598); *Ellis v. Ellis* (11 *Mass.*, 92); *State v. Hodgskln* (19 *Me.*, 155); *State v. Roswell* (6 *Conn.*, 446); and see especially the opinion of BLACKBURN, J., in *Dysart Peer-*

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STANLEY V. STANLEY.

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age Case (*L. R.*, 6 *App. Cas.*, 489, 534), decided in March, 1881, after the decision in the Breadalbane case (8 *L. R.*, 1 *Sc. & Div. App.*, 182), cited with such marked approval in *Hynes v. McDermott*.

I find, in the authorities cited, abundant warrant for holding this respondent unentitled to the presumption that her relations with the decedent ever ceased to be illicit and became matrimonial; and even if she could command the aid of such presumption, it would be of little avail to her in the light of all the evidence. By the judgment which divorced Tombs from this respondent in 1849, she was forbidden to marry again during the life of her former husband. For aught that is disclosed by the evidence, Tombs was alive when Stanley married the petitioner, and may, indeed, be alive to-day. The testimony of the respondent, that she was informed by Stanley himself that Tombs had died, and that she heard a report to that effect from other friends whose names she was unable to recall, does not suffice, even if fully credited, to establish the fact of his death or of her competency to become Stanley's wife at any period of their intimacy.

Again: The separation between Stanley and herself was not attended or followed by such circumstances as would naturally attend and follow a separation of husband and wife. She well knew of his marriage with the petitioner at the time it occurred; but though nearly thirty years ensued before his death, she took no steps to disturb that lady's *status* as decedent's lawful wife, or to cause the decedent himself to be prosecuted for bigamy, though all three of the

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STANLEY V. STANLEY.

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parties seem to have resided, during the whole period, in the city of New York. The respondent's conduct, and the conduct of her alleged husband, both before their cohabitation began and after it ceased, throw great discredit upon any presumption that can possibly be claimed to exist in favor of their marriage. Circumstances strikingly similar to those upon which I have just commented were the subject of consideration by the Court of Appeals in *Chamberlain v. Chamberlain* (*supra*), where a ceremonial marriage was sustained as against an earlier relation between the husband and another woman, which earlier relation was claimed to have been evidenced by habit and repute as matrimonial.

See, also, in support of the conclusions I have here reached, *Brinkley v. Brinkley* (*supra*); *Clayton v. Wardell* (*supra*); *Foster v. Hawley* (8 *Hun*, 68); *Taylor v. Taylor* (1 *Lee*, 571); *Rose v. Clark* (*supra*); *Caujolle v. Ferrie* (*supra*); *Collins v. Collins* (80 *N. Y.*, 9).

A decree may be entered, adjudging that Emma L. Stanley, and not Eliza C. Stanley, was, at the death of this decedent, his lawful wife; that this petition be granted, and that the letters of administration heretofore issued to this respondent be revoked.

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JONES V. HAMERSLEY.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—June, 1886.

JONES v. HAMERSLEY.

*In the matter of the probate of the will of LOUIS C. HAMERSLEY, deceased.*

The mere fact that one is a party to a controversy over the probate of a will in a Surrogate's court does not entitle him, under Code Civ. Pro., § 2624, to insist that, before the entry of a decree according probate, the court shall pass upon all questions which he may see fit to raise, respecting the validity, construction or effect of the will, or of any of its provisions.

As regards the persons who may invoke and the occasions for invoking the jurisdiction of a Surrogate's court to construe wills and pass upon their effect and validity at the time of admitting them to probate, the section cited has effected no substantial change in the law existing before the passage of the Code (L. 1870, ch. 359, § 11).

An occasion does not arise for the exercise of such jurisdiction under § 2624 unless, in accordance with the course and practice of the Supreme court, that tribunal would exercise its jurisdiction under similar circumstances.

A testator gave his entire estate to his executors, in trust to receive the rents, issues, profits and income arising therefrom, and to apply the same to the use of his widow during her life; providing that upon her decease the estate should go to the male issue of one A, and that in the event that A should die without leaving male issue, him surviving, the same should go to such charitable and benevolent corporations located in the State of New York, etc., etc., as testator's widow, might by her last will and testament, appoint.—

*Held*, that, while the widow and A were yet living, the Surrogate was not called upon, at the instance of any of decedent's next of kin, to pass upon the validity of that provision of the will which conferred the power of appointment.

REQUEST, by Sara P. Jones and others, who had been allowed to intervene in proceedings for the probate of decedent's will, as representing the estate of

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JONES V. HAMERSLEY.

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Alfred R. Jones, a deceased party, for the construction of certain provisions thereof, to the validity of which they had filed objections.

FRANKLIN BARTLETT, *for the application.*

CHALMERS WOOD, *special guardian.*

THE SURROGATE.—By the instrument which I lately admitted to probate as this testator's will, his entire estate, real and personal, is given to his executors, in trust to receive the rents, issues, profits, interest and income, arising therefrom, and to apply the same to the use of his widow during her natural life. The will then proceeds as follows: "Upon her" (the widow's) "decease I give, devise and bequeath my said estate, real and personal, to my issue. In the event, however, that no issue of mine shall survive my said wife" (and this event is now inevitable, as the testator left no issue), "then, on her decease I give, devise and bequeath my said estate, real and personal, to the male issue of my cousin J. Hooker Hamersley then living, and to the male issue of such of them as shall have previously died leaving issue, . . . . In the event, however, that my said cousin shall die without leaving male issue him surviving or surviving my wife, then, on the decease of my wife, I give, devise and bequeath the whole of my said estate, real and personal, to such charitable and benevolent corporations located in the State of New York, and incorporated by virtue of the laws thereof, and on such shares and proportions as my wife shall by her last will and testament, or instrument in writing, for



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JONES V. HAMERSLEY.

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that purpose made and executed and acknowledged by her, direct, designate and appoint; and for that purpose I hereby fully authorize and empower her to make such last will and testament or instrument in writing, direction, designation and appointment aforesaid."

The testator's cousin, J. Hooker Hamersley, survived him and is still living.

Certain of the persons who objected to the probate of the will now ask the Surrogate to pass upon the validity of the power of appointment which the testator, by the provision just quoted, has undertaken to confer upon Mrs. Hamersley. It is objected by counsel for the executors that there is as yet no necessity, no practical advantage, and, indeed, no propriety in passing upon this question; that as, under the will, Mrs. Hamersley is to have the entire income for life, and as there may be male descendants of J. Hooker Hamersley living at her death, the question whether the power of appointment is good or bad is of no immediate importance, and may never become important, and that no supposed doubts upon that subject can possibly affect the present rights of any persons interested in the estate or the present duties of any persons concerned in its administration.

It is agreed on all hands that the authority of the Surrogate in the premises springs solely from § 2624 of the Code of Civil Procedure. That section is in words following:

"If a party expressly puts in issue before the Surrogate the validity, construction or effect of any disposition of personal property contained in the

will of a resident of the State, executed within the State, the Surrogate must determine the question upon rendering a decree, unless the decree refuses to admit the will to probate."

The contestants insist that this provision is precise and definite in its terms, and must be obeyed with literalness; and that the mere fact that one has been a party to a controversy over the probate of a will entitles him to insist that, before the entry of a decree according probate, the Surrogate shall pass upon all questions such party may see fit to raise respecting the validity, construction or effect of such will, or of any of its provisions.

If this be in truth the clear, unequivocal intendment of § 2624, its directions must be followed, however unnecessary, inconvenient or absurd they may, in the present situation, appear to be. I do not, however, sustain the learned counsel for the contestants in their insistence that the section in question is so clearly worded and its meaning so obvious as not to call for judicial construction; on the contrary, it seems to me to be sadly in need of such construction.

I find no difficulty whatever with the word "must," upon which special stress was laid at the argument. No doubt that word has the mandatory signification which contestants' counsel claim for it. "The Surrogate *must* determine." But at whose instance must he, and under what circumstances and conditions, and pursuant to what practice and procedure? It is in these respects that § 2624 has a vague and doubtful meaning. I take it that, when a statute empowers a court to do a judicial act in a certain

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JONES V. HAMERSLEY.

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prescribed case, it is in general imperative on such court to exercise its authority whenever that case arises, provided that such exercise is duly applied for by a party who has a right to make the application. But it lies upon one who contends that the situation has come to pass in which the authority must be exercised to show that such is the fact, that he is entitled to invoke that authority, and has adopted the proper procedure for its invocation.

Now, while there is no embarrassment as regards this word "must," there are other words and expressions in § 2624 whose effect and force is far from obvious. The Surrogate is to act, says the statute, when a party "*expressly puts in issue*" the validity, construction or effect of any disposition of personal property contained in the will. The phrase italicized is one whose exact significance I confess my inability to understand. "Issue" is a word of very definite and precise meaning. Even apart from technical definition, it involves the notion of something in dispute between contending parties—something which is affirmed on the one side and denied on the other. It is only by a careless use of words that a mere request by a party to a probate controversy that the Surrogate shall determine the validity, construction or effect of a will, or some portion of a will, can be called a "putting in issue" by such party of such validity, construction or effect.

Again, if the presentation of such a request is to be deemed a putting in issue, and if the word "party," as used in § 2624, means any person who had been a party to the proceeding for probate, this

absurdity is the result: One who has no interest whatever under a will, except, for example, as the legatee of a trifling pecuniary bequest given by one of its clauses, may require the Surrogate to pass upon the validity, construction or effect of a complicated trust created by another clause. Nay, more: An unsuccessful contestant of a will, though he is not included in the number of its beneficiaries, may require a determination of the construction and effect of any or all of its provisions, not only without the consent, but even against the protest of every person absolutely or contingently interested therein. Surely an interpretation of § 2624 which would work these consequences should be avoided unless it is unavoidable, and in its stead should be adopted some other more agreeable to convenience, reason and justice (Maxwell on Interpretation of Statutes, 2nd ed., p. 230).

The provision of the Code which is now under discussion was enacted in place of an earlier provision (L. 1870, ch. 359, § 11). It is as follows:

“In any proceeding before the said Surrogate (that is before the Surrogate of the county of New York) to prove the last will and testament of any deceased person, as a will of real or personal estate, in case the validity of any of the dispositions contained in such will is contested, or their construction or legal effect are called in question by any of the heirs or next of kin of the deceased, or any legatee or devisee named in the will, the Surrogate shall have the same power and jurisdiction as is now vested in and exercised by

the Supreme court, to pass upon and determine the true construction, validity and legal effect thereof."

As statutes go, the one just quoted was reasonably perspicuous. Now, Mr. Commissioner THROOP, in the note which he has appended to § 2624; in his edition of the Code, says: "This section has been taken from L. 1870, ch. 359, § 11, which confers such a power upon the Surrogate of the city and county of New York. It has been so formed as to confine its application to a strictly domestic will, . . . . and to a will of personal property. . . . . *As thus amended*, the provision has been extended to all Surrogates' courts."

So far as this note throws any light upon the intention of the codifiers, it pretty plainly indicates that it was not their purpose to alter or vary the meaning of the act of 1870 in any other particulars than such as Mr. THROOP has specified.

The inferences that may fairly be drawn from this comparison of the earlier and later enactments are very clearly set forth by Maxwell in his treatise on Interpretation of Statutes (2nd ed., p. 95). He says:

"Before adopting any proposed construction of a passage susceptible of more than one meaning, it is important to consider the effects or consequences which would result from it, for they often point out the genuine meaning of the words. There are certain objects which the legislature is presumed not to intend, and a construction which would lead to any of them is therefore to be avoided. It is sometimes found necessary to depart, not only from the primary and literal meaning of the words, but also from the

rules of grammatical construction, when it is improbable that they express the real intention of the legislature, it being more reasonable to hold that the legislature expressed its intention in a slovenly manner than that it intended something which it is presumed not to intend. One of these presumptions is that the legislature does not intend to make any alteration in the law beyond what it explicitly declares, either by express terms or by unmistakable implication, or, in other words, beyond the immediate scope and object of the statute. In all general matters beyond, the law remains undisturbed. *It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law without expressing its intention with irresistible clearness, and to give any such effect to general words, simply because in their widest and perhaps natural sense they have that meaning, would be to give them a meaning in which they were not really used. It is, therefore, an established rule of construction that general words and phrases, however wide and comprehensive in their literal sense, must be construed as strictly limited to the immediate object of the act, and as not altering the general principles of the law."*

The learned commentator has grouped (pp. 96 to 114), a multitude of cases in which this doctrine has been asseverated and applied. Bearing in mind these principles of interpretation, the act of 1870, and the substitution in its place of § 2624 of the Code, can it justly be said that such substitution was intended

to work or has in fact worked any change in the policy of the law, as regards the persons who may invoke and the occasions for invoking the Surrogate's jurisdiction to construe wills and pass upon their effect and validity at the time of admitting them to probate?

I feel warranted by the authority of the cases collected by Sir PETER MAXWELL in holding:

1st. That no person can command the exercise of such jurisdiction, unless under the will whose provisions he seeks to have interpreted, he claims some interest in the personal estate bequeathed, or unless, on the other hand, he claims that because of the invalidity of the testator's disposition of such personalty or of some portion thereof, he is entitled to share in the same under the statute of distributions; and

2nd. That an occasion does not arise for the exercise by the Surrogate of the power conferred by § 2624 unless, in accordance with the course and practice of the Supreme court, that tribunal would, under similar circumstances, exercise its jurisdiction.

Two questions remain to be considered: Are these contestants, if the question of validity of the power of appointment may now be raised, competent to raise it? Would the Supreme court determine it in the present posture of affairs against the objection of persons interested?

The testator left him surviving no ancestor, descendant, brother, sister, nephew or niece. He left as his next of kin two uncles, an aunt, and several cousins. But his wife survived him, and, had he died intestate, would have been entitled to his entire personal estate

(R. S., part 2, ch. 6, tit. 3, § 75, subd. 3 ; 3 Banks, 7th ed., 2303).

I am at loss to understand, therefore, how the contestants have any interest in the determination of the validity of the power of appointment which they here seek to bring in question. If it is valid, and if it shall be exercised, that is the end of the matter ; if it is invalid, or if being valid, it shall not be exercised, then the decedent (in case his gift to his cousin's prospective male descendant shall also prove abortive) will be discovered to have made no effectual disposition of the *corpus* of his estate ; and so far as regards the personalty, with which alone this court can ever be concerned under § 2624, that estate will be found to have vested at his death in his widow, subject to a possible divestment that never in fact occurred.

Assuming, however, that this view is incorrect, and that the contestants have a contingent interest in the personal estate of the testator, I feel bound to deny their present application, as one which would not now be entertained and passed upon by the Supreme court for the reasons urged by counsel for the executors (*Wead v. Cantwell*, 36 *Hun*, 528 ; *Ward v. Ward*, 16 *Abb. N. C.*, 253). This conclusion is not at odds with *Lorillard v. Coster* (5 *Paige*, 172), or with *Hawley v. James* (5 *Paige*, 442). See the criticisms upon these cases in *Cross v. DeValle* (1 *Wall.*, 5). It is in harmony with the latter case, and with *Davis v. Angel* (8 *Jur.*, *N. S.*, 709 ; s. c., 8 *Jur.*, *N. S.*, 1024) ; *Minot v. Taylor* (129 *Mass.*, 160) ; *Goddard v. Brown* (12 *R. I.*, 31) ; *Hampton v. Holman* (*L. R.*, 5 *Ch. Div.*, 183) ; *Jackson v. Turnley* (21 *Eng. L. & Eq.*, 13) ;



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HARDENBERG v. MANNING.

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Thellusson v. Woodford (4 *Ves.*, 227, at pp. 309, 310, 328); Lady Langdale v. Briggs (39 *Eng. L. & Eq.*, 194, pp. 214-218); Bailey v. Briggs (56 *N. Y.*, 407).  
Application denied.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—June, 1886.

## HARDENBERG v. MANNING.

*In the matter of the estate of* STEPHEN S. ROWLAND,  
*deceased.*

The right of a creditor of a decedent, to priority in payment of his claim out of the assets of the estate, is unimpaired by the recovery of a judgment against the personal representative.

The claim of an executor or administrator to be reimbursed for the just and reasonable expenses of administration, as provided by 2 R. S., 93, § 58, is paramount to the demands of any creditors.

Decedent died intestate and insolvent, domiciled in New Jersey, and leaving personal property in that state and also in the county of New York. No administration was granted in New Jersey, but the widow, soon after the death, collected the assets there, brought them into New York county, and procured here letters of administration of the estate. Two creditors, of whom one had recovered a judgment in this State against decedent in his lifetime, and the other was decedent's medical attendant in his last illness, who had recovered a judgment here for the amount of his bill, against the administratrix, filed petitions for the payment of their respective claims. By the New Jersey statute, "the physician's bill during the last sickness" is accorded priority over the claims of ordinary creditors.—

*Held*, that the entire amount of the New Jersey assets, less their ratable contribution to the expenses of administration, should be applied to the discharge of the physician's claim, in preference to that of the judgment creditor of decedent.

Cook v. Gregson, 2 *Drewry*, 286—followed.

PETITIONS for the payment of claims out of the assets of decedent's estate. The facts are stated in the opinion.

JOSEPH ROURA, *for administratrix.*

CULVER & CULVER, *for D. S. Hardenberg.*

F. M. LITTLEFIELD, *for Florence M. Manning.*

THE SURROGATE.—The domicil of this decedent at the time of his death was in New Jersey, and it was there that, in March, 1880, he died. He left assets in that state, of the value of \$200 and upwards, and other assets of greater value in the city of New York. Soon after his death, his widow collected the New Jersey assets and brought them into the State of New York, and within the jurisdiction of this court. In April, 1880, she obtained letters of administration from the Surrogate of New York county. On January 13th, 1880, one Daniel S. Hardenberg, of Jersey city, N. J., applied to this court for an order directing the administratrix to pay him the amount of a judgment for about \$225, which he had recovered in the Supreme court of the State of New York. Hardenberg alleged in his petition that that judgment was for medicine, medical attendance, etc., etc., which he, as a physician, had furnished the decedent in New Jersey, on the occasion of decedent's last illness, and that by the statute laws of that state he was entitled to be preferred over general creditors in the administration of this estate.

It was claimed in his behalf that whatever priority

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HARDENBERG V. MANNING.

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would be accorded him under New Jersey laws, should here be recognized, at least so far as regards the disposition of the assets brought from that state into this, which assets were admittedly of greater value than the amount of the petitioner's claim.

The administratrix filed an answer to the Hardenberg application, and therein alleged, among other things, that decedent's estate was hopelessly insolvent (which is admitted on all hands). She denied that the petitioner was entitled to preference as a creditor of the estate, and alleged that one Florence M. Manning was so entitled, she having recovered a judgment in this State against the decedent, in his lifetime, for about \$500. The administratrix also alleged that the assets which would remain in her hands, after paying expenses of administration, would not suffice to pay the creditor so entitled to priority, and prayed that the Hardenberg petition should accordingly be denied.

An application was made to the Surrogate on January 27th, 1886, for an order directing the payment of the Manning judgment. The administratrix filed an answer alleging, among other things, the pendency of the proceedings brought by Hardenberg, and the consequent uncertainty whether the Manning judgment could be paid without injuriously affecting the interests of the other creditors.

These two petitions and answers give rise to certain delicate and perplexing questions.

Shall the New York judgment creditor, whose claim is, by New York law, superior in dignity to that of a physician seeking his compensation for attendance upon the decedent in his last illness, be allowed pri-

ority in respect to the entire assets of this estate? or shall the New Jersey creditor have preference so far as concerns the assets from that state? Or if neither of these schemes is worthy the sanction of the court, what other scheme should command its approval?

It is convenient to consider, at the outset, whether Dr. Hardenberg has lost any right of priority that he may have originally possessed by putting his claim into judgment. His judgment, *as such*, having been recovered, not against the decedent himself, but against the respondent administratrix, is, of course, inferior to the Manning judgment which was recovered against Mr. Rowland in his lifetime (R. S., part 2, ch. 6, tit. 3, §§ 27, 28; 3 Banks, 7th ed., 2298). But is Dr. Hardenberg's demand so "drowned in the judgment" that his original cause of action cannot here and now be taken into consideration?

The general doctrine of merger which this administratrix invokes is subject to exceptions in cases where its technical operation would work manifest hardship (Freeman on Judgments, § 217). In *Betts v. Bagley* (12 *Pick.*, 572, 579), SHAW, C. J., said: "When the essential rights of parties are influenced by the nature of the original contract, the court will look into the judgment for the purpose of ascertaining the nature of the original cause of action." To similar effect, see *Rawley v. Hooker* (21 *Ind.*, 144); *Owens v. Sprigg* (2 *Md.*, 457); *Wyman v. Mitchell* (1 *Cow.*, 316); *Dresser v. Brooks* (3 *Barb.*, 429); *Clark v. Rowling* (3 *N. Y.*, 216).

Judge COMSTOCK's syllabus of the case last cited is

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HARDENBERG V. MANNING.

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in these words: "A judgment upon a contract technically merges the demand, but not in so complete a sense that the courts may not look behind the judgment to see upon what it is founded, for the purpose of protecting the equitable rights connected with the original relation of the parties."

Upon the authority of these cases, and in view of certain facts and circumstances that will presently be the subject of comment, I hold that any right of priority which petitioner Hardenberg may have had at decedent's death remains unimpaired, notwithstanding his recovery of judgment against this administratrix.

The statute upon which he relies is in these words: "Judgments entered of record against the decedent in his lifetime, funeral charges and expenses, *and the physician's bill during the last sickness*, shall have preference and be first paid" (Laws of N. J., Revision of 1877, vol. 2, p. 764, § 58).

The phraseology of this statute provokes a query whether the Manning judgment would be treated by the courts of New Jersey as equal in dignity to the claim of Hardenberg, or as inferior, and whether, in case such claim shall be found worthy of any priority as regards the New Jersey assets, it should or should not share such priority *pro rata* with the former. This is a matter which will be hereafter considered. For present purposes, I shall assume that the Hardenberg claim would rank in the New Jersey courts above any judgment recovered against the decedent outside the limits of that state.

Now, if that assumption be correct, should the claim in question be here accorded, as regards the

New Jersey assets, the priority which would be accorded it in the New Jersey courts? Its title to such priority is challenged upon this ground: that property accounted for in a particular jurisdiction by an administrator appointed by that jurisdiction should be distributed (so far as regards conflicting demands of creditors) according to the law of the forum; and that, as by the law of this State the claim of a physician for attendance upon a decedent in his last illness is inferior in rank to that of a judgment creditor of such decedent, the Hardenberg petition should be wholly denied.

There is a multitude of reported cases in which questions have arisen as to the proper mode of marshalling the assets of a decedent's estate when a portion of such assets has fallen under the control of one state or country and another portion has fallen under the control of another. Most of these cases differ from the case at bar in this respect: that they have concerned the conflicting claims of administrators appointed in different jurisdictions, while this estate has no representative at the place of decedent's domicil. The problem does not seem to me, however, to be complicated by this circumstance. Now, if all the assets of this estate had been situated within this county at the time of the decedent's death, if a domiciliary administrator had been appointed in New Jersey, and if, after such appointment, letters had here been granted (whether to the same person holding the New Jersey letters or to another, and whether principal or ancillary in form), the scheme of administration that our courts would have been bound to

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HARDENBERG V. MANNING.

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adopt as between creditors is that which is provided by the statutes of New York. Such preferences would have been entitled to recognition as those statutes establish, and the preferences recognized by the *lex domicilii* would have been ignored. The claim of one who had recovered a judgment against the decedent in his lifetime would have been entitled to be paid in priority over that of a physician who had attended the decedent in New Jersey in his last illness, and whose demand would, in that state, be accorded the higher rank.

Upon this subject Mr. WHARTON says (Conflict of Laws, § 624): "Which law is to decide—the law of decedent's domicil or the *lex rei sitæ*? No doubt the tendency of the Roman jurists is to enforce that of the domicil. But in America the decisions are positive that the law of the *situs* is to prevail, which, of course, when *situs* and domicil conflict, is that of the ancillary administration granted at the spot where the property in question lies. In other words, funds in Massachusetts, belonging to a deceased person whose domicil was English, are to be distributed according to the law of priority in Massachusetts."

Judge STORY says (Conflict of Laws, 8th ed., p. 742, § 524); "The established rule now is that, in regard to creditors, the administration of assets of deceased persons is to be governed altogether by the law of the country where the executor or administrator acts, and from which he derives his authority to collect them, and not by that of the domicil of the deceased."

At page 743, § 525, Judge STORY states, as the

ground of this doctrine, "that every nation, having a right to dispose of all the property actually situate within it, has a right to protect itself and its citizens against the inequalities of foreign laws which are injurious to their interests." "The rule," adds the learned commentator, "of preference or of an inequality in the payment of debts (whether the one or the other course is adopted) is purely local in its nature, and can have no just claim to be admitted by any other nation which, in its domestic arrangements, pursues an opposite policy. In a conflict between our own and foreign laws, the doctrine avowed by Huberus is highly reasonable that we should prefer our own." "*In tali conflictu magis est ut jus nostrum, quam jus alienum, servemus.*"

The proposition that the assets left by this decedent in New York county should be administered by New York law is also supported by *Harrison v. Sterry* (5 *Cranch*, 289, 299); *De Sobrey v. Delaistre* (2 *Har. & J.*, 191); *Carson v. Oates* (64 *N. C.*, 115); *Moye v. May* (8 *Ired. Eq.*, 131); *Fellows v. Lewis* (65 *Ala.*, 343); *Findley v. Gidney* (75 *N. C.*, 395); *McElmoyle v. Cohen* (13 *Pet.*, 312); *Union Bank v. Smith* (4 *Cr. C. C.*, 21); *Miller's Estate* (3 *Rawle*, 312).

A different doctrine may well prevail as regards the administration, in a jurisdiction other than that of a decedent's domicil, of assets removed from his domicil after his decease, especially if such assets have been removed without authority and brought irregularly into the foreign jurisdiction. The distinction between the two classes of cases is clearly pointed out by



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HARDENBERG V. MANNING.

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Westlake in §§ 102 and 103 of his treatise on Private International Law (ed. of 1880):

(1) "Every administrator, principal or ancillary, must apply the assets reduced into possession under his grant in paying all the debts of the deceased . . . . in that order of priority which is prescribed by the law of the jurisdiction from which the grant issued. This rule is an immediate consequence of the maxim of private international law that the priorities of creditors in a *concurso* are determined by the *lex fori* or *lex concursus*—which indeed is almost an inevitable maxim, for if two debts were contracted under different laws, and each by the law under which it was contracted would be prior to the other, how shall their order of priority be determined if not by the law of the forum where they meet?" but

(2) "If, through the submission of a foreign administrator or otherwise, foreign assets are being judicially administered in England, the court will apply them as the foreign representative should have done—that is, *will assign to the creditors as against any particular assets that order of priority which is prescribed by the law*" (that is—the foreign law) "*under the authority of which those assets were reduced into possession*" (citing, among other cases, *Cook v. Gregson*, 2 *Dr.*, 286, and *Pardo v. Bingham*, *L. R.*, 6 *Eq.*, 485).

In *Cook v. Gregson* it was held, in accordance with the principle last stated, that where a person had died domiciled in Ireland, leaving property both in Ireland and in England, and the same executors in both countries, the holder of an Irish judgment had a right to

be paid in priority over English simple contract creditors out of Irish property remitted to England by the executors and being there administered. KINDERSLEY, V. C., declared that the assets so remitted should be administered precisely as if they had remained in Ireland, and in accordance, therefore, with the scheme of priority in force in the latter country.

In *Pardo v. Bingham* (*supra*), Lord ROMILLY, M. R., held that, where an English decedent residing, but not domiciled, in Venezuela had there contracted a debt with a citizen of that country, the creditor was not, by reason of a preference under the laws of Venezuela, entitled to claim in the English courts priority in payment of his debt out of a fund which by the English law was equitable assets for the benefit of all the creditors, but that such fund should be distributed according to the law of England. But Lord ROMILLY very distinctly intimated that if the decedent and his creditor had both been domiciled in Venezuela, and if the assets had been legal assets, located in that country at decedent's death, he would have reached a different conclusion.

I have discovered, after careful search, no American decisions that are in conflict with the doctrine of *Cook v. Gregson*. Its correctness was substantially recognized by GIBSON, C. J., in *Miller's Case* (*supra*). It was there a matter of contention whether a decedent at the time of his death was domiciled in Pennsylvania or in the country of Mexico. Letters of administration had been issued in Pennsylvania, upon the theory that he was domiciled in that state. At the time of his death he was a member of a firm engaged

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HARDENBERG V. MANNING.

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in business in Mexico. His surviving partners wound up the business and transmitted the decedent's share therein to the Philadelphia administrator. These assets were claimed by simple contract creditors domiciled in foreign countries, whose demands amounted to much more than the total value of the estate in the administrator's hands, and were also claimed by the assignees of a specialty creditor who contended for a preference. Debts under a specialty were by the Pennsylvania law entitled to be paid in priority. It was held that the decedent was domiciled in Pennsylvania, and that the law of that state should control the administration.

In referring to the demand of one of the unsuccessful creditors who had asserted a right to preference under the law of Mexico, the court observed (GIBSON, C. J.) that, if the claimant had been himself a Mexican, a different judgment would have been pronounced. "*Perhaps* our courts," said the learned Judge, "would direct a portion of the assets sufficient for the demand to be returned to the proper officer in that country; *certainly* they would not compel payment to be made in a way to deprive him of any advantage he could claim by its laws, or suffer him to be prejudiced by an irregular abduction of the assets from its jurisdiction."

It will be noted that, in the case at bar, the claimant Hardenberg is a resident of New Jersey, and was such resident at the time of rendering the services for which he now seeks to be paid. When it is further considered that the decedent had his domicile in that state, and that the assets with which we are here

concerned were there situate at the time of his death, it seems to me that the sequestration of those assets for the use of the New York judgment creditor would be an act of flagrant injustice.

I am confirmed in this view by certain observations of ANDREWS, J., pronouncing the opinion of our Court of Appeals, in *Matter of Hughes* (95 *N. Y.*, 55). It was held in that case that, though the only assets in the hands of an administrator of a decedent's estate holding letters granted by the Surrogate of Kings county, N. Y., were assets that had been irregularly brought from Pennsylvania, where the decedent was domiciled at his death, distribution should, nevertheless, under the circumstances disclosed by the evidence, be decreed by the Surrogate of Kings county. But in the course of his opinion, Judge ANDREWS says: "The removal by the appellant of the assets from Pennsylvania was illegal. The jurisdiction over the assets of an intestate is local, and upon his death their care devolves of necessity upon the sovereignty of the country where they may be, until a legal representative of the intestate is appointed who shall be entitled to their custody. The right of the domestic sovereignty over vacant assets pending the appointment of an administrator, besides being founded upon necessity, arises also from the general duty of the state to guard the interest of domestic creditors and claimants. Where assets so situated have been illegally removed from the jurisdiction of the domicil, to the prejudice of domestic creditors or others interested in the estate, it would, we conceive, be the plain duty of the courts in another jurisdiction, where they

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HARDENBERG V. MANNING.

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were found, to direct their return to the jurisdiction of the domicil. This course would be alike demanded by a sense of justice and the comity of states. A removal under such circumstances would rightly be considered an act of usurpation, to which courts would not lend their sanction."

It is impossible in the present case to transmit to the jurisdiction of this decedent's domicil the assets which were brought thence into this county, as the estate has there no legal representative. This court must, therefore, as regards those assets, take the course which it would pursue if sitting in New Jersey. Now it is not suggested by the respondent that there are in that state any persons who have claims against these assets superior or equal to those of Dr. Hardenberg. I think, therefore, that but for the necessity of making provision for defraying administration expenses, it would be proper to direct the immediate payment, not of the judgment, but of the original claim of Dr. Hardenberg. For it is true as regards the payment of a decedent's debts, no less than as regards the division of a surplus among his next of kin, that it is a matter, not of jurisdiction, but of judicial discretion, dependent upon the particular circumstances, whether a court will or will not decree distribution of the assets within its jurisdiction among all persons having an interest therein (1 Story's Eq. Jur., 13th ed., § 589). The administratrix is correct, however, in insisting that her right to be reimbursed for the just and reasonable expenses of her administration is paramount to the claims of any creditor of

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BIBLE SOCIETY V. OAKLEY.

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the estate (R. S., part 2, ch. 6, tit. 3, § 58; 3 Banks, 7th ed., 2303).

The accounting of the administratrix is now proceeding before the referee. When it shall have terminated and when the court shall have ascertained what amount is or should be in the hands of the administratrix for distribution among creditors, it will appear whether all, and if not all what part of, the Hardenberg claim can be satisfied. To the discharge of that claim the entire amount of the New Jersey assets, less such contribution as they must make to the payment of administration expenses, will be held applicable. Such claim ranks, as to such assets, above the Manning judgment, the same not having been recovered in the state of New Jersey, and being unentitled therefore to preference in that state (Cameron v. Wurtz, 4 *McCord*, 278; McElmoyle v. Cohen, 13 *Pet.*, 312; Brown v. Public Administrator, 2 *Bradf.*, 103).

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—June, 1886.

BIBLE SOCIETY v. OAKLEY.

*In the matter of the estate of ANN VOORHIS, deceased.*

A temporary administrator of a decedent's estate has not an absolute right to demand the judicial settlement of his account. As to whether he is an "administrator," within the purview of Code Civ. Pro., § 2689, relating to an application for discharge from office—*quære*.

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BIBLE SOCIETY V. OAKLEY.

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The pendency of a special proceeding for the revocation of probate of a will, is not a bar to the grant of letters testamentary; but an executor appointed while such a controversy is in progress has only such limited powers as are possessed, under Code Civ. Pro., § 2582, where an appeal has been taken from a decree admitting a will or granting letters.

A controversy over the probate of decedent's will, during which the court appointed a temporary administrator of the estate, having terminated in a decree admitting the same, the administrator submitted his account for settlement.—

*Held*, that the account should not be judicially passed upon, until letters testamentary had been issued, and the executors brought in as parties.

APPLICATION by Gilbert Oakley, temporary administrator of decedent's estate, for a judicial settlement of his account; opposed by the American Bible Society and American Home Missionary Society, residuary legatees under decedent's will.

C. E. TRACY, *for residuary legatees.*

D. M. HELM, *for temporary administrator.*

THE SURROGATE.—The paper propounded as the will of this decedent was, after a contest, admitted to probate by the Surrogate on November 9th, 1885. No testamentary letters have yet been issued to any of the persons whom it names as executors. One of those persons, Gilbert Oakley, Esq., has been acting ever since April 8th, 1882, as temporary administrator of the estate. He has recently filed his account, together with a petition for its judicial settlement, and has caused all persons who claim to be interested as creditors, legatees, heirs at law or next of kin, to show cause why he should not be discharged and why his letters should not be revoked.

It is insisted by counsel for the residuary legatees that the petitioner's accounts ought not to be settled

and determined until letters testamentary shall have been issued to such of the executors as may see fit to qualify.

On behalf of one of the decedent's next of kin, it is contended that the Surrogate has been deprived for the present of all authority to issue letters testamentary, by the institution of certain proceedings now pending before him for revoking the probate of decedent's will.

The latter contention is, in my judgment, unsound. Section 2636 of the Code provides that, "immediately after a will has been admitted to probate, the person or persons named therein as executors, who are competent by law to serve, and who appear and qualify, are entitled to letters testamentary thereupon, *unless*" — (here follows a provision to the effect that if before such letters are granted a creditor of the decedent or a person interested in the estate shall interpose "legal objections" to their issuance, the Surrogate must inquire into such objections, and determine whether or not they are well founded).

It is claimed by contestant's counsel that the provisions of § 2650 substantially forbid the issuance of letters testamentary during the pendency of proceedings for revocation of probate. I find no such inhibition in the letter or the spirit of that section. It seems, on the contrary, to contemplate, as does also the section preceding, that letters testamentary will, in all cases, have been actually issued by the Surrogate before proceedings for revocation of probate are set on foot.

The qualified stay of "all proceedings relating to



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BIBLE SOCIETY V. OAKLEY.

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the estate," for which § 2650 provides, is evidently intended to effect this result, and this only ; that pending a controversy over revocation of probate, the estate to which such controversy relates shall not be managed and dealt with either in accordance with the will or in accordance with the Statutes of Descent and of Distributions, but shall be so handled as to protect the rights of the next of kin and heirs at law of the decedent in the event of the establishment of his intestacy, and to protect the rights of all persons interested under the will, in case probate shall be ultimately upheld.

This view is in harmony with the scheme of the Code as regards the effect of an appeal from a decree of the Surrogate admitting a will to probate, or granting letters testamentary or letters of administration. Section 2582 declares that such an appeal shall not stay the issuing of letters, "where, in the opinion of the Surrogate, manifested by an order, the preservation of the estate requires that the letters should issue." The section proceeds to impose certain limitations upon the power of an executor or administrator to whom letters are issued pending such appeal. These provisions are substantially borrowed from the repealed provisions of the Laws of 1871, ch. 603, § 1. Prior to the enactment of that statute, an appeal from a decree admitting a will to probate operated, in case letters testamentary had not theretofore issued, as a stay of the issuance of such letters. The effect of the Act of 1871 was to confer upon the Surrogate a discretionary authority to issue letters testamentary even after the taking of such an appeal, the holder whereof

should be invested with all the powers of the executorial office except as expressly restricted by the terms of that act. The restrictions thus imposed, and now imposed by § 2582, relate to such powers, and such only, as would be specially called into exercise by the terms of the testator's will, and are practically the same as the restrictions occasioned by an application to revoke probate under § 2650.

I see no reason, therefore, why limited testamentary letters may not issue at once to such qualified persons as shall see fit to accept them. And I agree with counsel for the residuary legatees that it is proper that such letters should issue before any further steps are taken for the settlement of the temporary administrator's account. While that officer may, at the pleasure of the Surrogate, be compelled to render an account for judicial settlement (§ 2725), he does not seem to have any absolute right to demand such judicial settlement at any special time, or, indeed, to demand it at all, unless he is to be deemed, within the meaning of § 2689, an "administrator;" and if such is the case, this court may entertain his application for an accounting, with a view to the revocation of his letters, or may decline to entertain it.

Let the pending proceeding be suspended until letters testamentary shall have been issued to such persons as shall qualify as executors; it may be then pushed to a decree to which those executors may be made parties.

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YOUNG V. PURDY.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—June, 1886.

YOUNG v. PURDY.

*In the matter of the judicial settlement of the account of SAMUEL M. PURDY, as trustee of a trust created by the will of ANTHONY RABEL, deceased.*

Testator, who died in 1848, by his will bequeathed the residue of his estate, both real and personal, to the executors, in trust to hold and manage the same during the lives of his widow and son, receive the income, and pay the same, in specified proportions, to the widow, during her life, and his five children; with a direction for the division of the *corpus*, upon the death of the son and widow, among the remaining children. In 1868, a daughter, M., in consideration of a loan, to her, of \$15,000, funds of the estate, executed, in conjunction with her three children, an assignment of all her interest in decedent's estate, to an executor of, and trustee under the will, who was thereby authorized to hold and manage the same, and the proceeds thereof, until the loan should be repaid with interest, and, in case of default, to apply and appropriate the subject of the assignment to the payment of the indebtedness; which arrangement was carried into effect. M.'s share of the income being withheld by the trustee and distributed among the other beneficiaries, until he was discharged and a successor was appointed, by whom the same course was adopted.

At the death of M., which occurred in 1885, after that of the widow and son, the former was indebted to the estate in a sum far greater than the total income which had accrued for her benefit since the last accounting, and which had passed through the hands of the trustee. Upon the accounting of the trustee, with a view to a final distribution of the estate, two of the three children of M., as executrices of her will, interposed various objections to the account, contending, *inter alia*, that the withholding of M.'s fifth of the income was a violation of the terms of the will.—

*Held*, that objectors had no lawful claim against decedent's estate, except as to the excess, if any, of the value of M.'s entire interest therein, above the amount of her indebtedness; and that the objection should be overruled.

Upon a judicial settlement of the account of a testamentary trustee, pre-

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YOUNG V. PURDY.

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liminary to a final distribution of the principal of the trust, it appearing that one of the *cestuis que trustent* had executed to another, since deceased, an assignment, absolute upon its face, of his entire interest in the estate, the assignor submitted an affidavit setting forth that the instrument was intended by the parties thereto, merely as collateral security for a loan.—

*Held*, that, in the decree to be entered upon the accounting, the assignment must be recognized as valid, the Surrogate's court having no jurisdiction either to reform it, or to pass upon any equitable claim of the affiant against the representative of his assignee.

HEARING of objections, interposed by Maria A. Young and another, executrices of the will of Maria Valentine, a deceased beneficiary under the will of decedent, to an account filed by the acting trustee of a trust created by the latter will. The facts appear sufficiently in the opinion.

JAMES R. MARVIN, *for trustee*.

E. F. BROWN, *for objectors*.

A. A. REDFIELD, *special guardian*.

THE SURROGATE.—This testator died in 1848, leaving a will by which he bequeathed to the persons whom he appointed his executors his entire residuary estate, real and personal, upon certain specified trusts. During the lives of his wife Mary and his son Michael the trustees were directed to hold and manage such estate, to receive its income, to pay one third of such income as should be derived from the real estate to the wife of the testator during her life, and the remaining two thirds, together with all the income of the personal estate, to his five children. Direction was also given that, upon the death of his wife and

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YOUNG V. PURDY.

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his son Michael, there should be a division among the children of the *corpus* of the entire estate.

On April 1st, 1868, the testator's daughter, Maria Valentine, made an assignment to John S. Giles, as executor and trustee under her father's will. In that assignment her three children, Maria A. Valentine, Martina B. Valentine and Eliza R. Rabel, joined. The instrument recited that Maria Valentine was the owner of a farm in Livingston county, N. Y., on which there were several mortgages, amounting in all to more than \$12,000, and that, for the satisfaction of such mortgages and for other purposes, executor Giles had agreed to lend her, out of the funds of this estate, the sum of \$15,000. In consideration of this loan, Mrs. Valentine and her children assigned, transferred and set over to the executor "all their right, title and interest in and to the estate of Anthony Rabel, deceased." The executor, his successors, etc., were authorized to hold, manage and control the right, title and interest of the assignors in said estate and in the proceeds thereof until the said loan of \$15,000 should be repaid, with interest, and in case of default in payment to "apply and appropriate the right, title and interest" of said parties in and to said estate, or so much thereof as might be necessary, to the payment of the principal and interest of the loan.

Mr. Giles accounted, and was discharged in 1875, in the lifetime of Michael and after the death of the testator's widow. He had from time to time, in accordance with the assignment aforesaid, applied Mrs. Valentine's share of the income of this estate to the

part payment of the interest on the \$15,000 loan. During the course of his administration, he foreclosed certain mortgages given by Mrs. Valentine as security for that loan and obtained a deficiency judgment against her for \$8,521.20. He continued thereafter to withhold her income as it accrued and to distribute it among the other beneficiaries, crediting her with like sums on account of interest on the deficiency judgment. In 1875, he filed an account of his administration. It was insisted, in behalf of Mrs. Valentine, that his action in retaining her share of the income of the estate and applying it toward her indebtedness should not be sanctioned, and that the assignment aforesaid was void, being in contravention of the provisions of R. S., part 2, ch. 1, tit. 2, § 63 (3 Banks, 7th ed., 2182). That section declares that "no person beneficially interested in a trust for the receipt of the rents and profits of lands can assign or in any manner dispose of such interest."

While this provision is in terms restricted to the income of real estate, it has repeatedly been held that the income of personalty was within the reason and policy of the statute (*Graff v. Bonnett*, 31 *N. Y.*, 9; *Campbell v. Foster*, 35 *N. Y.*, 361; *Locke v. Mabbett*, 3 *Abb. Ct. App. Dec.*, 71; *Tolles v. Wood*, 99 *N. Y.*, 616).

An auditor to whom the issues of the Giles accounting proceeding were referred reported to the Surrogate that the application of Mrs. Valentine's income was proper, and that it was made "with her knowledge and approval and in accordance with the terms of her agreement."

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YOUNG V. PURDY.

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This report was subsequently confirmed, and by the decree entered on August 3rd, 1875, it was, among other things, adjudged that the accounts of the executor and trustee be allowed as presented. By that decree, Mr. Samuel M. Purdy, who is now accounting, was appointed trustee in place of Mr. Giles, discharged. He adopted the course which had been pursued by his predecessor, in retaining and distributing Mrs. Valentine's income, during the ten years that elapsed before her death in November, 1883. In December of that year he commenced proceedings for the judicial settlement of his account, and such account was filed on February 23rd, 1886. Maria A. Young and Martina B. Valentine, the executrices of Maria Valentine, interpose objections thereto. They allege that the trustee "has failed to carry out the provisions of the trust contained in the will, in that whereas said trust directs the trustees to pay over to Maria Valentine, during the life of the testator's widow and testator's son, one fifth share of the net income, etc., said trustee has neglected and failed so to do." Other objections present in various phases the same contention which was urged upon my predecessor in the accounting of 1875.

It is insisted by several of the parties hereto that the validity and effect of the assignment thus sought to be brought in question were determined by the decree of 1875 and are now *res adjudicatæ*. They cite authorities in support of the proposition that a judgment of a court of competent jurisdiction upon a question directly involved in a suit is conclusive in a second suit between the same parties depending upon

the same question, although the subject matter of such second action be different (*Doty v. Brown*, 4 *N. Y.*, 71; *White v. Coatsworth*, 6 *id.*, 137; *Demarest v. Darg*, 32 *id.*, 281).

Counsel for the contestants has submitted an affidavit to the effect that in passing upon the exceptions to the auditor's report confirmed by the former decree, Surrogate HUTCHINGS made a decision in writing which is now missing from the files of the court; that in the course of that decision the Surrogate declared that the discharged trustee was justified in retaining and distributing Mrs. Valentine's income, in view of the fact that she had repeatedly inspected his books and accounts, and that, having been thus advised from time to time of his action, she should be deemed to have sanctioned it.

It is insisted that when the decree of 1875 is examined in the light of the facts above set forth, it cannot be held to contain any adjudication as to the validity of Mrs. Valentine's assignment.

The affidavit of her attorney is, I think, admissible to explain the decree (*Doty v. Brown*, *supra*; *Dunckel v. Wiles*, 11 *N. Y.*, 420; *McKnight v. Devlin*, 52 *id.*, 399; *Wood v. Jackson*, 8 *Wend.*, 45), and the decree as thus explained does not, I think, preclude these objectors from now assailing the assignment. But, for reasons that will presently be stated, I do not think it necessary to pass upon the validity of that instrument or upon divers other questions that have been ably and zealously argued by the attorneys of the various parties to this proceeding. It is claimed, for example, that the trust attempted to be created



by the testator's will is not a valid express trust under the statutes, and that Mrs. Valentine's income has never been beyond alienation ; that if the trust is to be upheld at all it was extinguished in 1855, at the death of the testator's widow, and before the assignment was executed ; and that as these executrices, daughters of Mrs. Valentine, joined in that instrument, they are now estopped from attacking its validity.

Whether these contentions are correct or unfounded is a matter that, under existing circumstances, is of no practical importance. Assuming that the trust for Mrs. Valentine's benefit was valid, that it continued in full force until the death of Michael Rabel, and that Mrs. Valentine's income in all that interval was inalienable, these facts nevertheless remain : When Michael died and the trust was extinguished, Mrs. Valentine was yet living ; she was owing this estate a large sum of money ; at her own death, in November, 1885, she was still its debtor in a sum far greater than the total income which had accrued for her benefit since the last accounting, and which had passed through the hands of the trustee. Her representatives since her death have had no lawful claim and have now no claim against the estate, except to the excess, if any there be, of the value of her entire interest therein above the amount of her indebtedness (*Smith v. Kearney*, 2 *Barb. Ch.*, 533 ; *Wright v. Austin*, 56 *Barb.*, 13 ; *Springer's Appeal*, 29 *Penn. St.*, 208 ; *Allen v. Smitherman*, 6 *Ired. Eq.*, 341).

The contestants' objections are therefore overruled.

*Second.* The trustee's account contains a statement

that one R. S. Hayden, as administrator of G. B. Hayden, deceased, to whom in his lifetime this testator's grandson, Anthony A. Rabel, assigned his share in this estate, is entitled thereto. The accounting trustee has put in evidence a deed executed on January 16th, 1874, whereby Anthony A. Rabel conveys to Gilbert B. Hayden his entire interest under his grandfather's will. The assignor has submitted an affidavit which admits the execution of such deed, but alleges that, although it is absolute on its face, it was intended by the parties thereto merely as collateral security for a loan.

Upon proof of this allegation in a proper proceeding in a court of competent jurisdiction, the assignor may, doubtless, obtain the relief which he here seeks. A court of equity will look beyond the terms of an instrument to the real transaction, and when that is shown to be one of security and not of sale, will give effect to the actual contract of the parties (*Peugh v. Davis*, 96 *U. S.*, 336 ; *Brick v. Brick*, 98 *id.*, 514 ; *Ginz v. Stumph*, 73 *Ind.*, 209 ; *McMahon v. Macy*, 51 *N. Y.*, 155 ; *Hodges v. Tennessee Ins. Co.*, 8 *id.*, 416 ; *Despard v. Walbridge*, 15 *id.*, 374 ; *Henderson v. Fullerton*, 54 *How. Pr.*, 422).

But I am of the opinion that in the decree to be entered in this proceeding the assignment must be recognized as valid, and that this court has no jurisdiction either to reform it or to pass upon any equitable claim that the assignor may have against the assignee's representative (*Stilwell v. Carpenter*, 59 *N. Y.*, 414 ; *Bevan v. Cooper*, 72 *id.*, 317 ; *McNulty v. Hurd*, 72 *id.*, 518 ; *Boughton v. Flint*, 74 *id.*, 476 ; *Sheridan v. The Mayor*, 68 *id.*, 30).

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MATTER OF HARRIS.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—June, 1886.

## MATTER OF HARRIS.

*In the matter of the judicial settlement of the account of the executors of the will of HENRY HARRIS, deceased.*

The surviving partner of a decedent, who is also an executor of his will, is entitled to no remuneration, in the latter capacity, for his labors in winding up the business of the firm, the performance thereof being obligatory upon him as a duty incidental to the contract of partnership.

The right of testamentary *trustees* to retain, from time to time, in advance of an accounting, their commissions upon income received and paid out, is not in conflict with the established rule that *executors* cannot appropriate to themselves commissions, upon either principal or income, until the same have been awarded by a decree.

Executors have no vested right to commissions, which remains unaffected by a statutory change of rate or proportion, taking effect after their services are rendered, and before entry of the decree whereby their compensation is fixed.

In apportioning commissions among several executors, in the case of an estate exceeding \$100,000 in value, the provision of Code Civ. Pro., § 2736, directing a division of the aggregate award "according to the services rendered" by the recipients, respectively, requires that consideration should be given to the amount of time devoted by the executors respectively, to the affairs of the estate, and to the extent and importance of the labors which they have severally performed.

Hill v. Nelson, 1 *Dem.*, 357—approved.

CONTEST among Benjamin Russak and three others, the four executors of decedent's will, as to the quantum of their respective shares of commissions, to be awarded for executorial service, by the decree to be entered upon the judicial settlement of their account. The facts appear sufficiently in the opinion.

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MATTER OF HARRIS.

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ALGERNON S. SULLIVAN, EDWIN L. KALISH, ALFRED JARETZKI, and  
RICHARD S. NEWCOME, *of counsel for the executors.*

THE SURROGATE.—This testator died in June, 1879, leaving several testamentary papers thereafter admitted to probate as his will, whereby he appointed four executors, all of whom qualified in July, 1879, and all of whom have, since their qualification, taken some part in the administration of this estate. They have lately united in filing for judicial settlement an account of their proceedings, whereby it appears that the value of their testator's estate over all indebtedness is largely in excess of \$200,000. A question has arisen between them as to the share which they are respectively entitled to claim in the three full commissions that, under these circumstances, may be awarded for the entire executorial service by the decree to be entered in this proceeding.

At the time they entered upon the discharge of their duties, and at all times thereafter down to the 6th day of July, 1881, the rate of compensation of executors in estates of this magnitude was fixed by L. 1863, ch. 362, § 8, which, upon the adoption of the second part of the Code, was substantially incorporated into § 2736. This statute provided that where an estate was valued at not less than \$100,000, each executor, if the whole number of executors did not exceed three, should receive one full commission, and that, if their number should be more than three, three full commissions should be divided among them, share and share alike.

By the act of June 16th, 1881, § 2736 of the Code was amended so as to provide that the aggregate

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MATTER OF HARRIS.

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sum awarded as commissions in estates exceeding \$100,000 in value should be apportioned among the executors "according to services rendered by them respectively." Counsel for Messrs. Tobias and Greene, two of the parties here accounting, claim that their clients have a vested right in an equal division with their co-executors of the commissions upon such sums as were received and paid out prior to July 6th, 1881.

I do not think that this contention is sound. The Court of Appeals has lately held that trustees are entitled, in advance of an accounting, to retain from time to time their commissions upon incomes received and paid out (*Hancox v. Meeker*, 95 *N. Y.*, 528; *Matter of Mason*, 98 *id.*, 527). I do not understand that those decisions are at all in conflict with the proposition which has been frequently asserted by the courts of this State, that executors have no right to retain commissions either upon income or upon principal until the same have been awarded by a decree. See *Haskin v. Teller* (3 *Redf.*, 316); *Wheelwright v. Wheelwright*, 2 *id.*, 501); *U. S. Trust Co. v. Bixby* (2 *Dem.*, 496); *Freeman v. Freeman* (4 *Redf.*, 211); *Wheelwright v. Rhoades* (28 *Hun*, 57); *Hancox v. Meeker* (*supra*, 95 *N. Y.*, 528, at p. 539).

It is not, perhaps, a necessary corollary from this proposition that, when commissions are in fact awarded, they must be computed according to the standard of the law in force at the time the award is made; but, upon full reflection, that mode of computation seems to me to be the proper one.

It will be noted that, from the time when these

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MATTER OF HARRIS.

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accounting parties entered upon their duties until now, there has been no change in the law as regards the aggregate compensation awarded for their executorial service. There is here, therefore, no question between the executors on the one hand and the beneficiaries under the testator's will on the other, as to the amount to be allowed the former by way of commissions. The question is one in whose determination the executors themselves are the only persons interested.

Now, if the statutory reward were given solely for receiving and paying out the moneys of the estate, there would be much force in the suggestion that the respective rights of the several executors to share in the aggregate commissions should be determined as to the times when such receivings and such payings out took place, and according to the law at such times in operation.

But I agree with Surrogate COFFIN that, although the compensation of executors is to be measured by the fixed standard of a percentage upon the moneys passing through their hands, such compensation is not intended and has never been intended merely as a reward for their labors and responsibilities in receiving and paying out, but as a reward for their entire service in the management of the trust confided to their care (*Hill v. Nelson*, 1 *Dem.*, 357). And as executors do not become entitled to commissions until they are awarded by the decree which settles and determines their accounts, it is incumbent upon the Surrogate to apply the law in force at the time of the entry of such decree, and in the present case to ap-

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MATTER OF HARRIS.

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portion the aggregate compensation according to the services which these executors have rendered.

Consideration should be given to the amount of time devoted by them respectively to the affairs of the estate, and to the extent and importance of the labors which they have severally performed. I can easily conceive of an administration conducted by two executors, of whom one should receive and distribute all the assets, and the other should nevertheless be entitled, because of his care and pains in the management of the estate, to a larger share than his associate in the statutory compensation.

Now, it is quite evident, from the affidavits submitted for my consideration, that executor Russak has taken a more active and more important part in this administration than any of his co-executors; but I cannot, without further inquiry, make a satisfactory apportionment among them of the three commissions to which they are unitedly entitled. A large part of the assets of decedent's estate consisted, at his death, of his interest in a partnership whereof executor Russak was a member. As decedent's surviving partner, it was Mr. Russak's duty to wind up the business of the firm. This duty was incident to his contract of partnership, and he is entitled to no remuneration for performing it (*Washburn v. Goodman*, 17 *Pick.*, 519; *Beatty v. Wray*, 19 *Penn. St.*, 516; *Burden v. Burden*, 1 *Ves. & B.*, 171; *Ames v. Downing*, 1 *Bradf.*, 321, 334; *Dougherty v. Van Nostrand*, *Hoff. Ch.*, 68; *Franklin v. Robinson*, 1 *Johns. Ch.*, 158; *Brown v. McFarland's Ex'r.*, 41 *Penn. St.*, 129). Such services as he rendered in pursuance of that duty must, there-

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LANE V. LEWIS.

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fore, be disregarded in the settlement of this controversy. Everything done by him which he would have been bound to do as decedent's surviving partner, even though he had not been numbered among his executors, must be eliminated from the quantum of his services, before those services are compared with such as may appear to have been rendered by his associates.

Unless the parties can adjust their differences, I must direct a reference, the expense of such reference to be defrayed out of the aggregate commissions (*Hill v. Nelson*, 1 *Dem.*, 357).

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—June, 1886.

LANE v. LEWIS.

*In the matter of the estate of ELIZABETH BUCK  
(otherwise GILBERT), deceased.*

The office and authority of one designated a trustee by a will being derived wholly from that instrument, without intervention by any court, the *status* of such a person, where disqualified by statute to act in the capacity indicated, is substantially the same as that of an executor who, though for like reasons incompetent, has in fact received letters in the absence of opposition.

Hence where it appeared that the person appointed by a will, to execute certain trusts thereby created, was a non-resident alien, who had never signified his acceptance, nor assumed the duties, of the office,—

*Held*, that he might be removed, under the authority of Code Civ. Pro., § 2817, which permits the removal of a testamentary trustee for a cause which would prevent the issue of letters to him as an executor; and a successor be appointed as prescribed by *id.*, § 2818.



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LANE V. LEWIS.

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Where the decree of a Surrogate's court, removing a sole testamentary trustee, designates another in his place, the exaction of a bond from the successor, though not required by statute, is in the discretion of the court; which may also determine to whom notice of the proposed appointment shall be given.

PETITION, by George Lane, an infant beneficiary under decedent's will, for the removal of George Henry Lewis from office as trustee thereunder, and the appointment of a successor. The facts appear sufficiently in the opinion.

CHAS. L. DAVISON, *for petitioner.*

SCOTT & CROWELL, *for heirs and next of kin.*

BROWNELL & LATHROP, *for W. W. Gilbert.*

THE SURROGATE.—The testatrix died in this city on the sixth day of July, 1883. She left a last will and testament whereby she bequeathed and devised her entire estate to one George Henry Lewis, as trustee, with directions to sell the same, and after payment of her just debts to invest the proceeds of the sale, and to hold such investments upon certain trusts in such will specified. That instrument was admitted to probate on the 22nd of October, 1885. In behalf of George Lane, an infant beneficiary thereunder, objection was interposed to the granting of letters testamentary to George Henry Lewis, upon the ground that he was a non-resident alien, and was, therefore, not qualified to act as executor. This objection was sustained, and the public administrator was, in December, 1885, appointed administrator, *c. t. a.*, of this estate. George Lane has since filed a peti-

tion, wherein he represents that the same causes which disqualified Lewis from becoming executor disqualified him also from acting as testamentary trustee. The petitioner accordingly asks that the said Lewis be removed from the office of trustee, and that another be appointed in his place. Mr. Lewis himself is the only person who has been cited to attend this proceeding, and no person else has asked leave to intervene; but certain counsel, whose clients claim to be interested in the estate, have suggested as *amici curiæ* that the court is without jurisdiction to grant the relief prayed for, and that in no event should a new trustee be appointed, until all persons absolutely or contingently entitled to take under the will shall have been duly notified.

Whatever authority the Surrogate has, in a case like the present, is derived from §§ 2817 and 2818 of the Code of Civil Procedure. Section 2817 provides as follows: "A person beneficially interested in the execution of the trust may present to the Surrogate's court a written petition, duly verified, setting forth the facts, and praying for a decree removing a testamentary trustee from his trust; and that he may be cited to show cause why such a decree should not be made . . . . where, if he was named in a will as executor, letters testamentary would not be issued to him by reason of his personal disqualification or incompetency."

Now, it is admitted that the respondent has never acted as a trustee under this will, has never signified his acceptance of the office, and has never been qualified to assume its duties. It is insisted that, for that

very reason, he cannot now be *removed*. As a mere verbal criticism, this objection is not without force, but when it is remembered that a competent testamentary trustee derives his authority directly from the will appointing him; that he requires and receives no letters from the Surrogate as a badge of such authority; that except under special circumstances no bond can be exacted from him as security for the due performance of his duties; and when the language of § 2817 is carefully considered and compared with that of § 2685, it will be discovered that the objection has no solid foundation.

The present situation, indeed, seems to me to be one for which the legislature intended to furnish the precise relief which this petitioner asks. If the respondent had applied for and obtained letters testamentary, being at the same time a non-resident alien, the Surrogate could, undoubtedly, upon proper application, have revoked such letters and removed him from office, even in advance of any exercise or attempted exercise on his part of his functions as such executor (Code Civ. Pro., § 2685, subd. 1). The *status* of a person appointed by a will as testamentary trustee, and disqualified from acting as such by reason of alienage and non-residence, is practically the same as that of an executor, who, though similarly disqualified, has in fact obtained letters in the absence of opposition.

This conclusion is strengthened, I think, by the declaration of § 2514, subd. 6, that the expression "testamentary trustee," as used in ch. 18 of the Code, "includes every person (with certain exceptions) who

is designated by the will, or by any competent authority, to execute a trust created by a will." The respondent is a person designated by a will to execute its trusts, and I hold that whatever authority or show of authority the will gives him may be extinguished by the Surrogate, in the exercise of his jurisdiction under § 2817.

Section 2818, as amended by L. 1884, ch. 408, provides that "where a sole testamentary trustee . . . . is, by a decree of the Surrogate's court, removed . . . . and the trust has not been fully executed, the same court may appoint his successor, unless such an appointment would contravene the express terms of the will. . . . . Where a decree removing a trustee . . . . . does not designate his successor . . . . . the successor must be appointed and must qualify in the manner prescribed by law for the appointment and qualification of an administrator with the will annexed." It is claimed that, under this section, an appointment of a new trustee ought not to be made until all persons interested in the estate shall have been made parties to the proceeding, and that the trustee, when appointed, should give such bond as would be required from an administrator with the will annexed. It is clear that the statute does not make the exaction of a bond essential in a case where the decree, by which one trustee is removed, designates another in his place. That in such a case, however, the Surrogate may, in his discretion, require a bond I have no doubt (*Matter of Whitehead*, 3 *Dem.*, 227; *Tompkins v. Moseman*, 5 *Redf.*, 403; *Peo. v. Norton*, 9 *N. Y.*, 176; *Milbank v. Crane*, 25 *How. Pr.*, 193;

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WARDLOW V. HOME FOR INCURABLES.

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Matter of Stuyvesant, 3 *Edw. Ch.*, 299; Matter of Jones, 4 *Sandf. Ch.*, 615; Matter of Robinson, 37 *N. Y.*, 261).

These decisions also establish that, in a proceeding for the appointment of a trustee, it is not necessary that all persons interested in the trust property or estate should be made parties, but it is for the court, in its discretion, to determine to whom notice shall be given. I understand that, in the case at bar, the attorneys who were lately before the Surrogate as *amici curiæ* are authorized to represent all the beneficiaries under the will. They may have formal notice of this application, and will be heard, in respect to the selection of the trustee to be appointed, and the propriety of exacting a bond.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—July, 1886.

WARDLOW v. HOME FOR INCURABLES.

*In the matter of the application for probate of a paper propounded as the will of DENTON F. CONNER, deceased.*

The maxim, "*expressio unius exclusio est alterius*," when appealed to in support of the theory of an implied abrogation of a statute, is to be considered in connection with the principle—that repeals by implication are not favored.

L. 1881, ch. 641, limiting the power of benevolent and other societies, organized under L. 1848, ch. 319, to take by will, and expressly sub

## 474 CASES IN THE SURROGATES' COURTS.

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### WARDLOW V. HOME FOR INCURABLES.

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jecting them to the restrictions imposed by L. 1860, ch. 360, has not released them from that contained in the act of 1848, whereby they are rendered incompetent to receive a devise or bequest contained in a will executed within two months of the testator's death.

*It seems*, that the limitation, contained in the act of 1848, of the power of a person leaving a wife, child or parent, to devise or bequeath to a corporation formed thereunder, to one fourth of his estate, was repealed by the act of 1860, according to which one half of the estate may be disposed of in the manner mentioned.

DETERMINATION as to validity of will, upon application for probate. Objections were interposed in behalf of John F. Wardlow, heir at law and next of kin of decedent, and others. The facts appear in the opinion.

N. A. CHEDSEY, *for executor, proponent.*

BOORAEM & HAMILTON, M. BANTA, and JOHN A. O'BRIEN, *for contestants.*

STEARNS & CURTIS, *for legatee.*

THE SURROGATE.—While the contestant in this proceeding concedes that the paper lately propounded as decedent's will is entitled to probate, he raises an issue as to the validity of its sole dispositive provision, and asks the Surrogate, pursuant to § 2624 of the Code of Civil Procedure, to determine that issue upon the entry of a decree.

I have no doubt of the Surrogate's jurisdiction in the premises, for the provision in question is a "disposition of personal property" exclusively. The testator has directed his executors to convert his entire estate, real and personal, into money, and, after the satisfaction of his debts and funeral expenses, to pay the residue and remainder to the Home for Incurables of the city of New York.

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WARDLOW V. HOME FOR INCURABLES.

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This direction, if effectual at all, brought about at the death of the testator an equitable conversion of his real estate into personalty (*Van Vechten v. Van Veghten*, 8 *Paige*, 104; *Stagg v. Jackson*, 1 *N. Y.*, 206; *Meakings v. Cromwell*, 5 *N. Y.*, 136; *Hatch v. Bassett*, 52 *N. Y.*, 359; *Fisher v. Banta*, 66 *N. Y.*, 468; *Power v. Cassidy*, 79 *N. Y.*, 602-613).

The "Home for Incurables" is a benevolent association, organized in the year 1866, under chapter 319 of the Laws of 1848, entitled "An act for the incorporation of benevolent, charitable, scientific and missionary societies" (2 Banks, 7th ed., 1701). Section 6 of that act is as follows:

"Any corporation formed under this act shall be capable of taking, holding or receiving any property, real or personal, by virtue of any devise or bequest contained in any last will and testament of any person whomsoever, the clear annual income of which devise or bequest shall not exceed the sum of \$10,000; provided no person leaving a wife or child or parent shall devise or bequeath to such institution or corporation more than one fourth of his or her estate after the payment of his or her debts, and such devise or bequest shall be valid to the extent of such one fourth; and no such devise or bequest shall be valid in any will which shall not have been made and executed at least two months before the death of the testator."

This decedent died on January 23rd, 1886, just one week after the execution of his will. His bequest to the Home for Incurables is therefore ineffectual unless, since its incorporation, that society has been somehow

relieved from the restrictions of the last clause of section 6, above quoted. It is claimed by the proponents that such relief has been afforded by the legislature; that, not only as regards this particular legatee, but as regards every other corporation formed under chapter 319 of the Laws of 1848, the death of a testator within two months after the execution of his will no longer serves to defeat a devise or bequest for its benefit.

This claim rests upon the supposed repeal of the time clause above quoted by chapter 641 of the Laws of 1881, which is entitled "An act relating to the right of benevolent, charitable, religious, scientific and missionary societies to take and hold real and personal estate" (2 Banks, 7th ed., 1707). It provides as follows: "All corporations already formed, or which hereafter may be formed under and in pursuance of chapter 319 of the Laws of 1848, . . . . . and the several acts amendatory thereof, . . . . . shall in law be capable of taking, receiving, purchasing and holding real estate, for the purposes of their corporation, to an amount not exceeding the sum of two hundred thousand dollars in value, and personal estate, for like purposes, to an amount not exceeding the sum of two hundred thousand dollars in value; but the clear annual income of such real and personal estate shall not exceed the sum of fifty thousand dollars; *subject, however, to the restrictions upon devises and bequests contained in an act entitled 'An act relating to wills, passed April 13, 1860.'*"

The proponent insists that the words italicized have relieved corporations formed under the act of 1848



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WARDLOW V. HOME FOR INCURABLES.

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from all disabilities to take devises and bequests, save such disabilities as are imposed by the act of 1881 itself, and by the act of April 13th, 1860, and that as by the last named act the extent of the interval of time elapsing between the day when a testator executes his will and the day of his death is not made to affect the validity of his testamentary dispositions, the two months clause of the act of 1848 is no longer operative.

So far as I am advised, the question thus raised is now for the first time presented for judicial determination. The doubtful phraseology of the acts of 1848 and 1860 has occasioned many spirited controversies in our courts, but the contribution which the act of 1881 has made to the pre-existing confusion has not as yet been considered.

The act of 1860 (L. 1860, ch. 360; 3 Banks, 7th ed., 2288) is entitled "An act relating to wills," and is as follows: "No person having a husband, wife, child or parent, shall, by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association or corporation, in trust or otherwise, more than one half part of his or her estate, after the payment of his or her debts, and such devise or bequest shall be valid to the extent of one half and no more."

This is the restriction, and the only restriction which the act of 1881 expressly makes applicable to corporations formed or to be formed under the act of 1848. Does it follow from this that those corporations are no longer subject to the restrictions imposed by the act of 1848 itself? In other words has the two months

clause of the latter act been repealed by implication? One of the familiar doctrines of statutory construction is thus expounded by Maxwell in his *Interpretation of Statutes* (2nd ed., p. 186):

“An author must be supposed to be consistent with himself; and therefore if, in one place, he has expressed his mind clearly, it ought to be presumed that he is still of the same mind in another place, unless it clearly appears that he has changed it. In this respect the work of the legislature is treated in the same manner as that of any other author; and the language of every enactment must be so construed, as far as possible, as to be consistent with every other which it does not in express terms modify or repeal. The law, therefore, will not allow the revocation or alteration of a statute by construction when the words may have their proper operation without it.” And further (at p. 198): “Repeal by implication is not favored. It is a reasonable presumption that the legislature did not intend to keep really contradictory enactments in the statute book, or to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted, unless it be inevitable. Any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention.”

To similar effect see *Hayden v. Carroll* (*Ridg. Parl. Cases*, 545, 599; *Bowen v. Lease* (5 *Hill*, 221); *O’Flaherty v. McDowell* (6 *H. of L. Cases*, 149, 162); *Burnham v. Onderdonk* (41 *N. Y.*, 425); *Henderson’s Tobacco* (11 *Wall.*, 652); *Taylor v. Taylor* (10 *Minn.*,

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WARDLOW V. HOME FOR INCURABLES.

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107); *McCartee v. Orphan Asylum* (9 *Cow.*, 437, 507); *Escott v. Mastin* (4 *Moore, P. C. C.*, 104, 130); *Bruce v. Schuyler* (9 *Ill.*, 221); *Hill v. Hall* (*L. R.*, 1 *Ex. D.*, 414); *Bishop on Written Laws*, § 119.

Whenever a later statute stands well with a part but not with all of an earlier, "the effect of a repeal by implication is limited to that part of the earlier statute which is repugnant to or inconsistent with the later and does not extend to the earlier statute generally or even to such parts as may be in juxtaposition with the part repealed" (*Wilberforce on Statute Law*, p. 319).

Now it is plain that there is no inherent inconsistency between a restriction which prevents *a certain class* of testators from devising and bequeathing to *any* charitable societies more than one half the clear value of their estates, and another restriction which prevents *any* testator from making an effectual devise or bequest to *a certain class* of charitable societies, except by a will made and executed at least two months before his death. These two restraints upon the power of testators to give, and, by consequence, upon the power of corporations to take by bequest or devise, do not either in letter or in spirit clash with each other in the slightest degree.

But it is nevertheless insisted that the legislature of 1881, at the time of its enactment of chapter 641, must necessarily have had in contemplation the restrictions theretofore imposed by the act of 1848 upon associations organized thereunder, and that accordingly its explicit subjection of such associations to the restrictions of the act of 1860, and its failure to

subject them to any others, must be held to mean that all others were intentionally and deliberately abrogated. “*Expressio unius est exclusio alterius*,” says proponent’s counsel. The maxim is sensible and useful in logic and in law. But it should always be applied with care and discrimination ; and in attempting to apply it here for relieving a corporation founded under the act of 1848, from restraints which that very act imposes, one encounters the opposition of a legal principle, itself almost crystalized into a maxim, the principle to which I have already referred—that, in the construction of statutes, repeals by implication are always regarded with disfavor.

The reluctance of the courts to treat an act of the legislature as an annulment of a prior act, not expressly repealed, has been asserted with especial emphasis whenever such prior act has been one of public interest and importance, has long held its place upon the statute book, has received from time to time, by revisions and modifications, the sanction of successive legislatures, and has become in some sense a part of the policy of the law. As regards such a statute, there is exceptional force in the contention that if the legislature intended to repeal it, such intention would probably be disclosed plainly and in express terms, and not equivocally and *sub silentio*, and that a new enactment, not on its face destructive of the old, should be deemed additional and not substitutionary, in the absence of clear indications to the contrary.

Now, when the act of 1881 became law, all the numerous associations that had been incorporated

under the act of 1848 during the thirty-three years that had elapsed since it came upon the statute book, labored under the disability that a testator's devise or bequest in their behalf was void unless made at least two months before his death. That the legislature of 1881 removed this disability and abandoned the settled policy which had been pursued, as regards such associations, from the beginning of their corporate existence, is a conclusion that should not be lightly drawn from any doubtful or ambiguous phraseology of the 1881 statute.

In thus referring to the "settled policy" of our law, I am not unmindful of the language of EARL, J., in *Hollis v. Drew Theol. Sem.* (95 *N. Y.*, 166). The learned Judge comments upon the absence of any steady and uniform restrictive policy of the legislature in nullifying the testamentary dispositions of a decedent in favor of benevolent associations during the last two months of his life. But the Drew Theological Seminary, which was the beneficiary under the will whose validity was there in dispute, was a foreign corporation not formed under the act of 1848, and in no wise subject to the limitations of that statute. There is nothing in the language of Judge EARL which is in conflict with that of WRIGHT, J., who discusses, in *Levy v. Levy* (33 *N. Y.*, 97), the policy of this State in incapacitating a testator during the two months before his death from making a valid bequest or devise to corporations formed under the act of 1848.

There is nothing in conflict with the language of MILLER, J., who said, in *Kerr v. Dougherty* (*supra*),

that the restraints of the act of 1848 seemed to indicate "a general policy of the State in reference to restricting devises and bequests in favor of corporations of a particular class."

And in the very recent case of *Stephenson v. Short* (*supra*), all the present Judges of our Court of Appeals concurred in the opinion of RAPALLO, J., who commented upon § 6 of the act of 1848 as a provision "founded on the policy of the Statute of Mortmain," and declared that "the two months' clause was intended to protect all the heirs and kindred of the testator, and even the testator himself, against the influences which might be brought to bear upon him in his last moments, and the mistaken notions which might govern him in his apprehension of a speedy dissolution."

It does not seem to me either inexplicable or absurd that the legislature, as regards such benevolent and charitable corporations as have been suffered to spring into existence under the general law of the State, should have persistently adhered to the policy which it first inaugurated, and should nevertheless have departed from that policy in granting charters to particular corporations with such privileges and such restrictions as in its wisdom has seemed meet.

It would, I think, be pushing the doctrine of "*expressio unius*," etc., very far to treat the legislative declaration that corporations formed under the act of 1848 should thenceforth be "subject to the restrictions upon devises and bequests contained" in the act of 1860, as involving of necessity the abolition of all restrictions besides.

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WARDLOW V. HOME FOR INCURABLES.

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Suppose, that, when this law of 1881 was enacted, there had been upon the statute book this simple general provision: that a devise or bequest to no benevolent corporation whatever should be valid unless contained in a will executed at least two months before the death of its maker. Could it, in such a case, have been seriously contended that the passage of the act of 1881 had effected a repeal of such supposed statute so far as regarded corporations established under the act of 1848? Clearly not; and the situation thus assumed to exist does not differ essentially from the situation actually existent.

It is true that when the law of 1881 was enacted there was no general and universal time restriction upon testamentary gifts to benevolent societies; but there was a special restriction of that kind as regarded all such societies organized under the act of 1848, and as regarded the Home for Incurables with the rest.

I am strongly of the opinion that, only in so far as the act of 1860 is inconsistent with or repugnant to the act of 1848, has its incorporation into the act of 1881 repealed by implication the earliest of these three statutory provisions. Now that the act of 1860 stands well with the time clause of the act of 1848, and has not therefore worked its abrogation, has been repeatedly declared by our court of last resort (*Lefevre v. Lefevre*, 59 *N. Y.*, 434; *Kerr v. Dougherty*, 79 *id.*, 327; *Stephenson v. Short*, 92 *id.*, 433).

I hold, therefore, that by its subjection to the restraints of the acts of 1860, the Home for Incurables has not been so emancipated from the act of 1848 as

to be capable of receiving the bequest here in question.

This conclusion derives no slight support from *McCartee v. Orphan Asylum Soc.* (9 *Cow.*, 437) and *Bowen v. Lease* (5 *Hill*, 221). In the former case the defendant, by the act incorporating it, was empowered to obtain real estate by *purchase*. It was nevertheless incompetent, because of the restrictions of the Statute of Wills, to take real estate by *devise*, unless those restrictions had been impliedly removed by the terms of its charter. In declaring that such removal had not been effected, WOODWORTH, J. (p. 507), said: "The Statute of Wills prohibits a devise to a corporation. The act incorporating the Orphan Asylum Society declares that they may purchase real estate. In the most extensive signification of the word *purchase*, it includes a devise, and therefore relates to the subject which by the Statute of Wills is excepted. These statutes, I apprehend, ought to be construed together; and inasmuch as the right claimed is by the former statute expressly denied, it would seem to be more congenial to the spirit of both acts to understand the word purchase in a restricted sense, and as so intended by the legislature."

The decision in *Bowen v. Lease* has a still closer application to the case at bar. It was given upon the following state of facts:

The eighteenth chapter of the first part of the Revised Statutes had two titles (3 and 4) which related to the powers, privileges and liabilities of corporations, the conduct of their directors, etc., etc. Section 4 of title 4 provided that transfers and assignments



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WARDLOW V. HOME FOR INCURABLES.

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of their property in contemplation of insolvency should be utterly void. The act incorporating the New York and Erie Railroad Company provided that that corporation should "possess the general powers and be subject to the general restrictions and liabilities *prescribed by title 3 of the 18th chapter.*"

It was claimed that this express reference to and adoption of title 3, taken in connection with the absence of any reference to title 4, relieved the railroad company from the provisions of the latter title, upon the principle that "*expressio unius est exclusio alterius.*"

NELSON, J., pronouncing the opinion of the court, after referring to the doctrine that all laws are supposed to be enacted with deliberation, and that it must be presumed that in passing a statute the legislature did not intend to interfere with or abrogate any former statute relating to the same matter, unless the repugnancy between the two was irreconcilable, declared that the corporation was subject to the restrictions of title 4 no less than to those of title 3.

"We are asked," said the learned Judge, "to give to this section an important effect by implication, viz.: to declare that it operates a total repeal of the fourth title. The settled rule as to the construction of statutes forbids that we should do so. There is no repugnancy or contradiction between the former law and the 18th section of the charter. . . . Grant that it adopts the provisions of the third title, surely there is nothing in this which is inconsistent or irreconcilable with those contained in the fourth."

In the case just cited, the provision in dispute was

treated by the court as a *clausula inutilis*, such as according to Lord BACON's maxims, Reg. 21, "expresses no more than the law by intendment would have supplied."

Similarly, in the case at bar, the provision which has occasioned this controversy must be treated as utterly superfluous, unless, *perhaps*, it has served to enlarge the capacity of corporations established under the law of 1848, so as to enable them to take, by the devise or bequest of a testator, leaving at his death a wife or child or parent, not merely one quarter but one half of his entire estate—I say *perhaps*, in view of the fact that in some of the reported cases wherein the interpretation and effect of the acts of 1848 and 1860 have been under consideration, it seems to have been taken for granted that the terms of the latter statute are broad enough to include corporations established under the former. I cannot find, however, that the proposition has ever been decisively asserted, and it may well be that the draftsman of the statute of 1881 (or the draftsman of chap. 51 of the laws of 1870, upon which the statute of 1881 has apparently been modeled) made use of the words, "subject, however, to the restrictions," etc., *ex majori cautela*, from an apprehension that the original one fourth limitation of the Act of 1848 might continue to be held applicable to corporations formed thereunder, unless such corporations were expressly brought under the operation of the general statute of 1860.

By way of summarizing my conclusions, I restate the provisions of § 6 of the Act of 1848: Its three clauses are:

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HAYWARD V. PLACE.

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1st. "No person leaving a wife or child or parent shall devise or bequeath" to corporations formed thereunder "more than one fourth of his or her estate after the payment of his or her debts." [This provision, if not impliedly repealed, even as regards such corporations by the Act of 1860, is now very clearly abrogated by the incorporation of that act into the Act of 1881.]

2nd. "Such devise or bequest shall be valid to the extent of such one fourth." [This provision is now modified so as to make such devise or bequest valid to the extent of one half.]

3rd. "No such devise or bequest shall be valid in any will which shall not have been made and executed at least two months before the death of the testator."

This provision is still in force and because of it, the bequest here in controversy is ineffectual and void.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—July, 1886.

## HAYWARD v. PLACE.

*In the matter of the estate of SUSAN A. PLACE,  
deceased.*

A claim, touching which an action is pending in a court of the city of New York, in the name of a removed executor, is an unadministered

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HAYWARD V. PLACE.

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asset of the decedent's estate, which gives to the Surrogate of that county jurisdiction to issue letters of administration with the will annexed.

The fact that the defendant in such action is the husband of one entitled to those letters, does not defeat the latter's right of priority under the statute.

The provision of Code Civ. Pro., § 2693, that "the proceedings to procure the grant" of the letters, "where all the executors . . . . become incapable . . . . or the letters are revoked as to all of them . . . . are the same as in a case of intestacy," does not change the order of priority among claimants of letters of administration, *c. t. a.*, established by *id.*, § 2643.

APPLICATION by James K. Place, decedent's husband, for letters of administration with her will annexed; opposed by Emeline P. Hayward, her daughter. The facts are stated in the opinion.

CHARLES F. WELLS, *for husband.*

J. K. HAYWARD, *for daughter.*

THE SURROGATE.—Of the three persons named by this testatrix as her executors, but two have ever taken letters testamentary, and the letters of those two have been revoked. The estate is now, therefore, without a legal representative. The husband of the testatrix, who is a beneficiary under her will, applies for letters of administration with the will annexed. He alleges, in his petition, that the only unadministered asset known to him is a chose in action, touching which there is now pending, in the Superior court of the city of New York, a suit at law, wherein the late executor is plaintiff and Mr. Hayward, the husband of one of the daughters of the testatrix, is defendant. The petitioner's application in his own behalf, and his suggestion that, if that

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HAYWARD V. PLACE.

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application be denied, letters should issue to the public administrator, are opposed by Mrs. Hayward, who insists (1) that there is no occasion for making an appointment at all; and (2) that, if that contention is pronounced untenable, she is herself entitled to letters in preference both to the petitioner and the public administrator.

Section 2643 of the Code of Civil Procedure provides, among other things, that where, because of revocation of letters, there is no executor or administrator, *c. t. a.*, qualified to act, letters of administration, *c. t. a.*, shall issue as follows: "1st, to one or more of the residuary legatees," etc. Mrs. Hayward is one of the residuary legatees under her mother's will; the two others are her brother, Barker Place, the deposed executor, and her sister, Mrs. Sullivan. Mrs. Sullivan makes no claim to letters. Barker Place is of course disqualified.

*First.* I think that the claim, for the establishment of which the removed executor was prosecuting an action at the time of the revocation of his letters, is an unadministered asset of the estate, and that the Surrogate has jurisdiction, therefore, to appoint an administrator with the will annexed.

*Second.* I am equally clear that Mrs. Hayward is entitled to letters in preference to the petitioner. The circumstance that the claim referred to is a cause of action against her husband does not defeat her right of priority. It is not made a ground of disqualification by the statute, and only for cause that constitutes a statutory disqualification can one who is otherwise entitled be denied letters (*Churchill v. Prescott*,

2 *Bradf.*, 304; Estate of Charles Morgan, 2 *How. Pr., N. S.*, 194; Emerson v. Bowers, 14 *N. Y.*, 449; McGregor v. McGregor, 3 *Abb. Ct. App. Dec.*, 92; Coope v. Lowerre, 1 *Barb. Ch.*, 45; O'Brien v. Neubert, 3 *Dem.*, 156).

Counsel for the petitioner claims that the provisions of § 2693 of the Code would justify the Surrogate in granting his client's application. That section declares that the *proceedings* in procuring letters of administration or letters of administration, *c. t. a.*, for the successor of the original holder or holders of such letters, shall be "the same as in a case of intestacy." But this declaration is evidently not intended to change the order of priority established by § 2643; it simply indicates the practice which must be followed by the person entitled to letters in order to obtain their issuance.

A claim similar to that which is set up by the petitioner was urged upon Surrogate McVEAN, in Matter of Ward (1 *Redf.*, 255).

Section 45, title 2, ch. 6, part 2 of the Revised Statutes (3 Banks, 6th ed., 83) provided that, in case of the revocation of letters of all the executors or administrators of an estate, the Surrogate should issue letters of administration "with the will annexed, or otherwise, as the case may be, to the widow, or next of kin, or creditors of the deceased, or others, in the same manner as hereinbefore directed in relation to original letters of administration."

Section 14 of the same title established the order of priority to letters of administration with the will annexed. (That section was repealed by the Laws of

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HAYWARD V. PLACE.

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1880, chapter 245, and in its place has been substituted § 2643 of the Code.) Section 27 of the same title established the order of priority to original letters of administration in cases of intestacy. (That section is still in force.)

It was held by Surrogate McVEAN, that § 45 (*supra*) should be construed as declaring that administration, *c. t. a.*, upon the estate of a decedent who had died testate, should in all cases be granted to applicants in the order of preference prescribed by section 14, and that administration, *d. b. n.*, upon an estate should be granted in the order of preference prescribed by § 27. This interpretation was subsequently approved by Surrogate CALVIN, in *Bradley v. Bradley* (3 *Redf.*, 512).

The cases above cited confirm me in the opinion that the provision in § 2693 of the Code (which has taken the place of § 45, *supra*, of the Rev. Stat.), that, in case of the death, incapacity, or removal of "all the executors or all the administrators to whom letters have been issued . . . . the Surrogate must grant letters of administration to their successors *in like manner as if the former letters had not been issued*," means that, for ascertaining rights of preference, resort must be had, in cases of testacy, to § 2643 of the Code, and in cases of intestacy, to § 27 (*supra*) of the Revised Statutes.

POSTLEY V. CHEYNE.

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NEW YORK COUNTY.—HON. D. G. ROLLINS, SURROGATE.—July, 1886.

POSTLEY v. CHEYNE.

*In the matter of the estate of ALEXANDER F. STERLING, deceased.*

The fact that executors are "men of inconsiderable means, not transacting business or having any place of business," does not show that their "circumstances are such that they do not afford adequate security for the due administration of the estate," within the meaning of Code Civ. Pro., § 2685, prescribing the grounds for revocation of letters testamentary.

Where letters testamentary have been issued to one not a resident of the State, they cannot be revoked because of his continued non-residence, nor can an official bond be required of him upon that ground.

The will of testator nominated as two of its executors two residents of another state, expressly providing that they might act as such without giving security. The nominees were respectively the treasurer and the cashier of a foreign manufacturing corporation having its principal office in the city of New York, and attended daily thereat, in such capacities, during business hours.—

*Held*, that they had "an office within the State, for the regular transaction of business in person," within the meaning of Code Civ. Pro., § 2638, and were entitled to letters without giving bonds.

Where a will appoints three persons trustees to receive the rents and income of property, and apply the same to the use of one of their number during life, with remainder over, the two who do not take beneficially are entitled to the custody of the principal of the trust fund, to the exclusion of the other.

CONTEST among co-executors; the facts respecting which are sufficiently stated in the opinion.

BROOKE POSTLEY, *for executrix.*

A. UNDERHILL, *for executors.*

THE SURROGATE.—This testator left at his decease



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POSTLEY V. CHEYNE.

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real and personal property of the value of about fifteen hundred thousand dollars. By his last will and testament, which was admitted to probate in February, 1885, he appointed his daughter, Margaret S. Postley, executrix, and Hugh Cheyne and John Scott (whom he characterized as his "friends") executors, declaring that he had entire confidence in their integrity, and therefore directed that they should not be required to give bonds for the faithful performance of their duties.

Upon the day the will was admitted to probate, letters testamentary were granted, no person objecting, to all three of the above named persons. At that time neither Mr. Cheyne nor Mr. Scott was a resident of New York. They both resided and have ever since resided in the state of New Jersey.

The decedent's entire estate, except a comparatively small amount bequeathed as legacies and annuities, is given by the will to his executors and executrix upon certain specified trusts. They are vested with authority to sell all or part of the real property in their discretion, to invest the proceeds thereof and the proceeds of the personal estate, to collect and receive the rents and income, and to "apply the said rents and income, as they accrue, to the use of my (his) daughter, Margaret S. Postley, during the term of her natural life, and at her death the said trust property shall go to her issue, if she leave any, but if she leave no issue, then my said executors shall pay out of the said trust property to my son in law," etc. Mrs. Postley, thus named in the will as executrix and

*cestui que trust*, has filed a petition asking for relief in various forms against executors Cheyne and Scott.

*First.* I am asked to revoke the testamentary letters of the respondents upon the ground that, within the meaning of subdivision 5 of § 2685 of the Code of Civil Procedure, their "circumstances are such that they do not afford adequate security for the due administration of the estate."

This claim is not supported by the proofs. Indeed the averments of the petition, even considered apart from the answer, do not make out a case for revocation of letters under such fifth subdivision. The respondents are alleged to be "men of inconsiderable means not themselves transacting any business or having any place of business." That is all and that is not enough (*Martin v. Duke*, 5 *Redf.*, 597; *Grubb v. Hamilton*, 2 *Dem.*, 414).

*Second.* The fact that the respondents reside without the State of New York is claimed to justify and require the revocation of their letters or the exaction of a bond for the petitioner's protection. In opposition to this claim it is urged that, as the respondents were non-residents when they obtained such letters, the mere continuance of that *status* is not of itself a sufficient ground either for pronouncing sentence of revocation or for requiring security.

Section 2636 of the Code of Civil Procedure provides that, immediately after a will has been admitted to probate, the persons therein named as executors, who are competent by law to serve, and who appear and qualify, "*are entitled* to letters testamentary," unless before such letters are granted some person

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POSTLEY V. CHEYNE.

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interested in the estate interposes an objection, in the manner by such section indicated. The grounds upon which letters must or can be refused, in case objection is made to their issuance, are nowhere specified in the Code. A statute in force at the time the Code was enacted and abrogated by the General Repealing act of 1880 (L. 1880, ch. 245) declared that, with certain exceptions, which need not now be specified, a non-resident applicant should not be granted letters testamentary except upon giving a bond (R. S., part 2, ch. 6, tit. 2, § 7; 3 Banks, 6th ed., 73). While there is now no direct and explicit provision of law that an objection to the issuance of letters testamentary on the ground of the non-residence of the applicant must be sustained, unless such applicant executes a bond for the faithful discharge of his duties, the legislature has indicated by § 2638 of the Code its adherence to the policy of the repealed statute. That section impliedly recognizes the force of an objection based upon non-residence, by declaring that such an objection shall not prevent the issuance of letters *if* the applicant shall give a bond as prescribed by law.

In the absence of such opposition, however, letters may be properly issued without a bond, as they were in fact issued in the case at bar (Estate of Demarest, 1 *Civ. Pro. Rep.*, 302; Estate of Vernon, *id.*, 304, *n*).

Now the grounds upon which letters may be *revoked* are set forth in the eight subdivisions of section 2685 of the Code. None of these subdivisions can be claimed to have any reference to the question of non-residence except the 6th, and possibly the 1st. The 6th is clearly inapplicable to such a situation as

here exists, being in express terms limited to the case of an executor's removal or intended removal from the State *after* the issuance of letters. Subdivision 1st is operative only "where the executor was, when letters were issued to him, or has since become *incompetent or disqualified by law to act as such.*"

It is insisted by the petitioner's counsel that the case at bar falls within the subdivision just quoted. I am of a different opinion, and for several reasons:

1st. Because if that subdivision relates to non-residence at all it covers cases in which an executor becomes a non-resident *after* as well as cases in which he was a non-resident *before* obtaining letters. But such cases are distinctly and expressly provided for by subdivision 6. Of two possible constructions of subdivision 1, that should of course be preferred, other things being equal, which does not make subdivision 6 utterly superfluous.

2nd. For the reasons stated by Surrogate LIVINGSTONE and Surrogate CALVIN in Estate of Demarest and Estate of Vernon (*supra*), I hold that these respondents are not now, and were not at the time of obtaining letters, *incompetent or disqualified* by the fact of non-residence to act as executors. On the contrary, in spite of such non-residence they are and were competent and qualified, within the meaning of § 2638.

3rd. There is still another reason for holding that an executor's non-residence is not sufficient warrant for revoking his letters, where he was such non-resident at the time the letters were granted, and where his *status* as such non-resident has remained unchanged.

In the attempted transference, into the Code, of the well considered scheme of the Revised Statutes in regard to non-resident executors, an important provision seems to have been overlooked. I refer to the provision which permitted an executor whose letters were sought to be revoked on account of his removal or intended removal from the State, to prevent such revocation by the interposition of a bond (R. S., part 2, ch. 6, tit. 2, §§ 20, 21 ; 3 Banks, 6th ed., 75). As the law now stands, this is impossible. If it is shown that after the grant of letters an executor has abandoned his residence within the State, or is about to abandon it the Surrogate *must* (except in certain cases which will hereafter be noted) decree revocation.

Now if § 2685 covers cases of non-residence which existed at the time of the grant of letters, this result follows: that though in the absence of objection, a non-resident executor has an absolute right to letters even without giving a bond, and though he has that right, even in the face of objection, upon furnishing such bond, the letters must as soon as granted be taken away if any person interested in the estate demands it. An interpretation which involves such absurd consequences should certainly be avoided, if the language to be interpreted is capable of some other sensible construction.

For the foregoing reasons, I hold that, when letters have been issued to a non-resident executor, they cannot be revoked merely because of his continued non-residence, nor can any bond be for that cause required of him.

*Third.* It is claimed by the respondents that, even

if they are wrong in the contention that I have just sustained, they are entitled to retain their letters testamentary without giving bond by virtue of the last clause of § 2638 (*supra*). That clause declares that a person named as executor in a will, "against whom there is no objection except that of non-residence, is entitled to letters testamentary without giving a bond, if he has an office within the State for the regular transaction of business in person, and the will contains an express provision to the effect that he may act without giving security." There is no dispute about the facts to which this provision is claimed to be applicable.

The Singer Manufacturing Co. is a foreign corporation organized under the laws of New Jersey. It has had for many years, and now has, an office in the city of New York. In that office, both of these respondents are personally engaged from day to day in the transaction of the business of the corporation. One of them, Mr. Cheyne, is a stockholder of such corporation, its treasurer and a member of its board of directors. The other, Mr. Scott, has long been, and is now, its cashier. Mr. Commissioner THROOP, in a note to § 2638 of his edition of the Code, says that that section is intended as a consolidation of a part of § 6, tit. 2, ch. 6, part 2, R. S. (3 Banks, 5th ed., 155), and of chapter 657 of the Laws of 1873—and adds that "the description of a person having a place for the transaction of business within the State has been modified so as to correspond with the expression used *in pari materia* throughout this act"—that is, throughout part 2 of the Code.

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POSTLEY V. CHEYNE.

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The Revised Statutes (§ 7 of the title just cited) made the issuance of letters to non-resident executors conditional upon the execution of a bond, allowing no exception in case of such non-residents as might be engaged in business within the State. This provision was amended by the Act of 1873, above referred to, so as to read as follows: "Such non-resident executor may receive such letters without bonds if the testator, by words in his last testament, has requested that his executor be allowed to act without giving bonds, *and if such executor has his usual place of business within the State.*"

There could scarcely have been any difficulty in interpreting that provision. I think that such a case as the present would clearly have fallen within it. Now, does the provision by which it has been displaced cover substantially the same ground, or has it a narrower scope or a wider?

Sections 3160 and 3169 of the Code are evidently the sections to which Mr. THROOP refers in his note above quoted. Section 3160 provides that where the plaintiff in an action brought in the Marine court has "an office for the regular transaction of business in person" within the city of New York, he shall be deemed a resident of that city within the meaning of §§ 3268 and 3269, which relate to security for costs. Section 3169 prescribes the proofs necessary to be adduced in obtaining from a Justice of the Marine court a warrant of attachment, and declares that when the ground of the application is that the defendant is a non-resident of the city of New York, it must appear by affidavit that such defendant "has not an

office within that city where he regularly transacts business in person."

From Mr. THROOP's preliminary note, to the title of which §§ 3160 and 3169 form a part, it appears that in his view those sections were meant to be a substantial reproduction of chapter 136 of the Laws of 1876, which declares that "no person being a resident of the State of New York, who shall have a *place of business* in the city of New York, shall be deemed to be a non-resident under the provisions of this act."

I agree with Mr. THROOP in thinking that the expression "usual place of business" as it was employed in chapter 657 of the Laws of 1873 is co-extensive in meaning with the expression, "office for the regular transaction of business in person," now appearing in § 2638. And upon the proofs submitted in this proceeding I hold that, by virtue of the last clause of that section, the respondent executors, when they obtained letters, would have been entitled thereto without a bond, even though the grant of such letters had been opposed on the score of non-residence, and that accordingly the application for the revocation of letters because of such non-residence must be denied.

*Fourth.* The petitioner asks that, in case she shall be found entitled to no other relief, the Surrogate shall, in the exercise of his discretionary authority under § 2602, direct a deposit of the property of the estate to the joint credit of the executors and the executrix, and subject to their joint order.

I should give this direction if I did not feel constrained by the authority of *Bundy v. Bundy* (47 *Barb.*, 135; 38 *N. Y.*, 410) to sustain the respond-



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STEBBINS V. HART.

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ent's contention that, in view of the provisions of the will making the petitioner the beneficiary of the rents, profits and income, they themselves are entitled to the custody of the funds of this estate to the petitioner's exclusion. I can not find that Bundy v. Bundy has ever been overruled or adversely criticised. The petitioner's application must be in all things denied.

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ORANGE COUNTY.—HON. R. C. COLEMAN, SURROGATE.—April, 1885.

## STEBBINS v. HART.

*In the matter of the probate of the will of JOHN WILSON, deceased.*

Declarations, by an alleged testator, that he did not want the government to get his property, and that he did not intend to leave anything to certain relatives,—

*Held*, to imply an intention to make a will.

Allegations of the exercise of undue influence over a decedent, in respect to the testamentary disposition of his property, must be proved like any other material fact. Their truth cannot be guessed out.

Upon the hearing of a special proceeding instituted to procure probate of decedent's will, which, after bequeathing certain pecuniary legacies, gave the residue to a person therein named, proponent called, as a witness, a legatee who had released his interest to the temporary administrator, to testify to communications between himself and decedent. Contestants objected to the admission of this paper and testimony on the ground that the former did not discharge the legacy, or, if it did, that it effected an assignment to the residuary legatee,—the witness being, in either case, incompetent under Code Civ. Pro., § 829.—

*Held*, that both the paper and the testimony were competent, and should be received.

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STEBBINS V. HART.

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PETITION for the probate of decedent's will, presented by John L. Hart, therein nominated sole executor thereof; opposed by Angelina Stebbins and others, decedent's next of kin. The facts appear in the opinion and note.

B. R. CHAMPION, *for executor.*

H. BACON, *for contestants.*

THE SURROGATE.—I am of opinion that the formal execution of this will has been legally proved, and that the testator, at the time of such execution, was legally competent to make a will.

Although John Wilson was nearly, or quite eighty years of age at this time, and had been for many years addicted to the use of liquor, latterly even excessively, up to the time of his last illness his mental capacity was good. This illness, which finally resulted in death, whether brought on by the excessive use of liquor or by a malarial fever, undoubtedly very much enfeebled him, during that illness, both in body and mind; but he was very far from being without any mind. So little mental capacity, when uninfluenced or unpervverted by delusion, is required by law to make a valid testamentary disposition of property, that it is quite difficult to determine the point at which legal mental capacity ends

In determining Wilson's mental condition during his sickness, the conduct of the parties surrounding him during that time has had quite as much influence with me as their stated opinions upon the trial. I have yet to discover that any of them treated Wilson

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STEBBINS V. HART.

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then as if they then believed him not to be in possession of his mental faculties, so as not to appreciate or remember their treatment of him. Certainly, Herman Kidd believed Wilson to be all right on that Sunday morning, when, at Wilson's request, he sent for "Squire" Hart, to make a new will, in which he was to be remembered.

I do not understand that there is any pretence that Wilson was influenced in making his will by a perverted or unsound condition of mind; but what is claimed by the contestants is that, at the time of making the will, his mental faculties had become so weakened as to render him incapable of making a valid will, or as to render him the subject of undue influence, in the making of the will now offered for probate. In determining whether either of these propositions is true, it is necessary to consider the disposition of property undertaken to be made by the will, and Wilson's character and surroundings.

He was a very old man, with many marked peculiarities; and upon the whole, a very uninteresting person. He lived by himself, in filth, with mean provisions for his support, although able to provide better, not knowing, so far as the proof shows, of any living relative. Nor had he any friendships, so noticeable that any who knew him well would at once recognize his probable beneficiaries. He had, in early life, lived in Charles Kidd's family; and, after his death, Wilson kept up friendly relations with several members of that family. Many years ago, he also formed the acquaintance of Allen Oldham and his family, and had manifested what was, for him, a very considerable interest in one of his children, a daugh-

ter, now about twenty years of age, having bestowed upon her the only favors shown by him to any one, except in his habit of freely inviting others to drink his whiskey with him.

Outside of natural ties, these seem to have been the only ones likely to be remembered by Wilson in disposing of his property. He had no religion, nor any disposition to remember charitable objects. He seems, by remarks, to have given hopes to both the Kidds and the Oldhams of being remembered in his will, though it is my opinion that Wilson did not intend the Kidds to know what his real purposes were. His only positive declarations in regard to his property were, that he did not want the government to get it, and that he did not intend to leave anything to his sister or her descendants, if she, or any of them, were living. This implied an intention to make a will. By this will, Wilson gives to Howard N. Kidd, \$300; to Herman E. Kidd, \$500; to Gov. Millspaugh, Jr., \$100; to John Bowman, \$300; to John L. Hart, \$300; and the residue to Elenor Oldham. The estate was valued at about \$23,000.

At the time Wilson asked to have Hart sent for, to prepare this will, the only persons present with him were Herman Kidd, Gov. Millspaugh, Jr., and Cornelius Lake. After Hart came, the only other persons who came in were the two witnesses to the will. No member of the Oldham family was present, and it does not appear that they knew what was being done. Herman Kidd and Gov. Millspaugh, Jr., have appeared as hostile witnesses on the probate, and undue influence cannot be charged to them. The witnesses to the will and Lake have no interest under the will,

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STEBBINS V. HART.

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and, as far as we know, will not be benefited or injured by the admission or rejection of the will. The only other person present was "Squire" Hart, who is given a legacy of \$300.

The law is well settled that, in order to avoid a will upon the ground of undue influence, the "influence must be such as to overpower and subject the will of the testator, thus producing a disposition of the property the testator would not have made if left freely to act his own pleasure;" and this must be proved like any other fact. It must not be guessed out. If Hart was the sole or the principal legatee, under the circumstances of this case, a presumption might have been raised, unfavorable to the validity of the will. No such relation is shown to exist between him and Elenor Oldham as in any way to impeach his acts in connection with the execution of the will; nor is there any evidence of any such influence on the part of Elenor Oldham, or any of her family. Her mother is proved to have spoken to Wilson twice upon the subject of his will. On both occasions she says the subject was introduced by him. Elenor on several occasions called on him and brought him delicacies to eat. And her father says that, on the occasion when Wilson gave him the savings bank book for his daughter, Wilson mentioned his intention of providing for her. The evidence fails to establish any such influence on the part of any one, upon John Wilson's mind, as would have induced him to make any other than such a disposition of his property as he desired to make.

He was very feeble at the time, but appears to have had a complete understanding of his wishes and

desires as to how he intended to dispose of his property. Hart says\* Wilson sat upon the bedside, and told him what he wanted, and as Wilson did so, he wrote it down on a piece of paper with a pencil; and although Wilson was asked to lie down while the will was being drawn, he, Wilson, said he would sit up, and did so;—that he then taxed his strength too much is evidenced by the tremulous signature. After the will was written, it was read over to him, and in answer to Hart's question if that was what he wanted, he said it was. Upon a careful consideration of all the testimony, I have reached the conclusion that at this time John Wilson was competent to make a will, and not under any restraint.

The will will, therefore, be admitted to probate.

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\* NOTE BY THE SURROGATE.—Upon the hearing, the proponent called as a witness, John L. Hart, the executor, and upon objection being made because of a legacy to him in the will, the temporary administrator was called, who testified that Mr. Hart had delivered to him an instrument in writing, which was then offered in evidence. By this instrument, Hart released to the administrator all interest which he had under the will, the same to be of the same effect as though he had not been named in the will. The contestants objected to the admission of this paper, and to the admission of Hart's testimony, upon the grounds: That it did not operate to discharge the legacy; and, if it did, then it became in effect an assignment to the residuary legatee of the legacy, and in such case the witness could not testify on behalf of his assign (Code Civ. Pro., § 829).

The paper was received in evidence, and the testimony of Mr. Hart taken (*Whelpley v. Loder*, 1 *Dem.*, 368).

This case was taken to the general term, principally upon this point, and the Surrogate was there affirmed—opinion filed December term, 1885 (*Mem.*, 38 *Hun*, 643), which, however, does not bring out this point.

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MORSE V. SCOTT.

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ORANGE COUNTY.—HON. R. C. COLEMAN, SURROGATE.—October, 1885.

MORSE v. SCOTT.

*In the matter of the application for probate of a paper propounded as the will of JOHN S. SAMMONS, deceased.*

Evidence of the existence of insane delusions, in the mind of an alleged testator, is not countervailed by proof of the possession of business capacity in ordinary transactions.

Upon proof of a delusion naturally affecting the testamentary act, the onus of showing that the former did not exist when the latter was performed is thrown upon proponents.

Decedent, who died at the age of eighty years, unmarried, and leaving him surviving a sister, nephews and nieces, grew up a farm laborer, never learned to read or write, had naturally a weak and superstitious mind, and often exhibited eccentricities of behavior, though his physicians and bankers testified that he was rational and shrewd in his business transactions. In middle-life, he became possessed with a dominating purpose to cause his body to be preserved to the end of time, to effectuate which he purchased a metallic coffin, declared by him to be made of wood and iron melted together, built a vault upon his farm for its reception, and, because his relatives would not survive for the requisite period, bestowed his entire property upon the trustees of a church, though himself neither philanthropic nor religious, as an inducement to them to undertake the trust of perpetually caring for his resting place and remains.—

*Held*, upon all the evidence as to testator's life, character, and declarations, that the will, though perverse and unreasonable, in view of his ties of relationship, could not be rejected upon that ground; but that probate must be refused for the reason that, at the time of execution, he was controlled by the insane delusion that his body was to be preserved during all time.

PETITION for the probate of decedent's will, presented by James Scott, therein nominated executor

thereof; opposed by Sarah D. Morse and others, decedent's heirs at law.

W. J. WELCH, and B. R. CHAMPION, *for executors, proponents.*

HENRY WIGGINS, and H. A. WADSWORTH, *for contestants.*

THE SURROGATE.—Unless it appears, from the testimony, that John S. Sammons was influenced in making the instrument propounded as his last will and testament by an insane delusion, the will should be admitted to probate, all other legal requisites having been sufficiently proved. The law permitted him to dispose of his own as he desired, whether that desire was induced by a ridiculous fancy to preserve his tomb, or a sincere wish to benefit the religious body selected by him as his principal beneficiary, although in so doing he excluded those recognized by our statutes as his heirs, provided only that such desire is the outcome of a sane purpose.

An insane delusion is defined by Dr. Gray, in the Calhoun will case (2 *Redf.*, 40), as a belief in the existence of that which has only an existence in the imagination of the person. Dr. Williams in this case says: "It is a false belief that governs and controls the individual in his actions." By the law of this State, a person having insane delusions may make a valid testamentary disposition of his property when such delusions have not influenced the mind of the testator in making the disposition. Van Guysling v. Van Kuren (35 *N. Y.*, 70) is a case in point. In that case, the testatrix believed that she saw and was interfered with by "spooks" and witches; but that



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MORSE V. SCOTT.

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belief did not enter into, or apparently affect the manner in which she disposed of her property. She selected some of her relatives, in preference to others equally related to her. The more common form of insane delusions, which have been held by the courts, to have vitiated wills, is that one which led the testator to believe that those, who by nature were his protectors and should have been the recipients of his bounty, were seeking to injure and kill him, and believing in this delusion, cut off such persons from sharing in the estate.

Judge DENIO well says, in *Seamen's Friend Society v. Hopper* (33 *N. Y.*, 619, 624): "On questions of testamentary capacity, courts should be careful not to confound perverse opinions and unreasonable prejudices with mental alienations." There is no question but that John S. Sammons was a man full of perverse opinions and unreasonable prejudices, and his will must also be regarded as perverse and unreasonable when viewed in connection with his life, character and ties of relationship, for he was neither benevolent, philanthropic or religious. He had a sister and nephews and nieces, for all of whom he apparently entertained friendly feelings; and yet, by this will, he would disinherit them all and give his property to a church society, not for the purpose of advancing the cause of religion, but, as he himself says, for the purpose of having his vault preserved to the end of time. Now, was this only the result of a freak or whim, or was it the result of some mental disturbance?

In order to determine this, we must consider the

character, habits and life of the man: he was an ignorant man—had never learned to read or write, except his name—had naturally a weak and superstitious mind—was never married—grew up a farm laborer—in middle life inherited a farm from his mother, which is about all the property he ever had, except as he has accumulated and saved from the products of this farm—thought he heard a voice, while in the field one day shortly before his mother's death, telling him of that event; and when himself over fifty years of age, while ploughing in a field, found a stone scraped by the plough with marks, which he thought were the figures, 52, indicating his own death on his fifty-second birthday—hearing then, or at some other time, a voice in the air, which foretold the same event—by reason of which he gave public notice that he was to die on that day, so that, according to one witness who was present, some two hundred people were gathered about his house—he had in the meantime built for himself a vault upon his farm, directed an undertaker to be present, and had purchased and brought to his house a metallic coffin, which he told one witness was made of wood and iron melted together, and which he told several witnesses would preserve his body to the end of time. He was, also, at this time, greatly concerned by the threat of a neighboring doctor, that, if he died at this time, he would scrape the flesh off his bones, wire them together, put a ring in his head, and hang him up to fight the four winds. Just how much this threat had to do with the building of the vault and the buying of the coffin is not clear; but he did, after

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MORSE V. SCOTT.

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that, make a will in which he gave his body to a trusted friend to be preserved. For a time after the day fixed for his death, he seemed shy of meeting people—was generally, however, boisterous, and would frequently shout to people passing by his house on the highway, whether he knew them or not, and stop them—would ask them where they were going and other questions—would sometimes, immediately after asking a blessing, break out in oaths—was generally profane and often indecent in his language. He buried two horses on his farm, and erected tombstones at their graves. At one time, he bought a coffin, similar to his own, for his dog, before it died, to test the preserving qualities of the coffin; and at another time, he also got a coffin for his cat; and, after they died, placed their dead bodies in these coffins, and kept them about the house until the flesh became putrid, and, when expostulated with on the subject, objected to burying them, and said he thought the coffins ought to have preserved the bodies better. He made a number of wills, in all of which it would seem some provision was made for perpetually maintaining his vault, and in one of which provision was made for a public burying ground on his farm for animals.

I do not mention all these facts because I think them all evidences of insanity; in fact, I think the most of them by themselves are not; but they do show a very weak and eccentric mind, and one in which delusions might readily find lodgment, which might in time become fixed delusions so as to control his actions.

His habits of life were to the last degree filthy. He was, at the same time, niggardly of his money, and wasteful about his house and farm. During life, he gave little or nothing to the church or any other cause, and only paid for work done for him when he could not avoid it, or was compelled to do so.

On the other hand, by the testimony of many of his neighbors, of his tradesmen, of his bankers and of physicians, who knew him well, it appears that, while acknowledged by them to be an eccentric man, he was, in their judgment, rational in all his acts, accustomed to buy and sell at the best advantage, doing his banking and other business correctly and understandingly, and continued so to be and to do until the time of the accident which occasioned his death, when he was about eighty years of age. While this may be and probably was true, so far as their intercourse with him was concerned, it is well settled that evidence of delusions is not countervailed by evidence of business capacity as to ordinary business transactions. It is also held that, when delusions are shown before the execution of the instrument, naturally affecting its provisions, the burden is shifted upon the proponents to show that they did not exist when the instrument was executed (*Shaw's Will*, 2 *Redf.*, 107, 126, and cases there cited).

I am entirely satisfied that, before the execution of the will offered for probate, John S. Sammons had at least two well settled insane delusions. One was that he was to die on his fifty-second birthday. While it is true that he did not die then, and therefore, could not well, after that, entertain the delusion, still he

himself frequently said, in reference to the matter, that he was only living on borrowed time. And it is, also, true that this delusion probably did not affect the provisions of this will. Its principal importance to my mind is that it shows that, having had such a delusion, there is greater probability of his having others on kindred subjects.

The other delusion was the belief that his body was to be preserved to the end of time—either by his coffin or by some other means. Whatever matters he may have been mentally sound upon—however successfully he may have conducted his farm, or traded or correctly done business—he never gave up the idea that his body was to be preserved to the end of time; and therefore the necessity, in his mind, of having perpetually a suitable place for its protection. For this purpose, he built a vault upon his farm and then seeks some means of having that vault always cared for. He declines to make his relatives trustees for that purpose, for, as he says: they would not live to the end of time. At one time, he thinks of town officers and their successors, as trustees, but finally selects the trustees of the church, which he had occasionally attended, and their successors, as the proper persons to take care of the vault, and made the farm, upon which it is situated, and his other property, an inducement to undertake the trust.

When the person who was about to draw his will sought to persuade him to remember his relatives in the disposition of the property, he makes no objection to them on account of unfitness, dislike or animosity; but seemed intent only on one object, to

provide a means for the preservation of his vault, and said of his nephews in that connection, "Dody, will they live for ever?" Both witnesses to the will say that he said that one of the principal reasons for giving his property to the church was to have his vault cared for. The person who drew the will says his whole bent seemed to be to have his vault preserved.

Was this purpose, from which nothing could divert him, the desire of a sound mind? If it was, the law will uphold it, whether done to indulge a whim or to gratify his vanity. If, however, the purpose was induced by the insane delusion that his body was going to be preserved to the end of time, and he was thereby induced and influenced to provide and perpetually maintain this vault for that reason, then the will is the result of an insane delusion, which controlled his judgment and misled his understanding in relation to the subject upon which it was acting, and must, therefore, be regarded as invalid, because it does not express the will of a testator of a sound, disposing mind.

After carefully considering the whole case, I have come to the conclusion that John S. Sammons, at the time of making the will, was controlled in making it by the insane delusion that his body was going to be preserved to the end of time. The will, therefore, will not be admitted to probate.

Having reached this conclusion, it will not be necessary for me to pass upon the question of the validity of the devise to the church.

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LOCKWOOD V. CARR.

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ORANGE COUNTY.—HON. R. C. COLEMAN, SURROGATE.—January, 1886.

LOCKWOOD v. CARR.

*In the matter of the judicial settlement of the account of LEWIS E. CARR, as administrator of the estate of CHARLES B. GRAY, deceased.*

Any court may inquire into the jurisdiction of any other, where the proceedings of the latter are brought before it by a party claiming the benefit thereof.

2 R. S., 88, 89, §§ 36, 37, relating to a reference of a disputed claim against a decedent's estate, making no provision for the adjudication of any other matter than *the justice of the claim*, the referee has not power to pass upon any questions except such as are incidental and necessary to the determination of the main inquiry.

Upon the judicial settlement of the account of the administrator of the estate of decedent, who during his lifetime was engaged in business in partnership with another, one L. sought to procure payment, out of the assets of that estate, of a demand representing moneys paid by her as follows: (1) the amount of a note signed by each partner, and by her as accommodation maker, for money borrowed by the firm and used in their business; (2) five other notes executed to her by the partners, in their individual names, after dissolution of the firm, and endorsed by her for their accommodation, the same being in renewal of firm notes previously made to, and in like manner endorsed by her; all of which notes she was compelled to pay. A judgment of the Supreme court, entered upon the report of a referee appointed under the statute, had determined the right of L. to share, ratably with the individual creditors of decedent, in the assets of the estate, which were insufficient to pay both classes of claims in full.—

*Held*, that this determination was not binding upon the individual creditors or the Surrogate's court; that the instruments held by L. were not enforceable against decedent's estate on the theory that they were joint and several liabilities of the makers, but retained their original character as evidences of partnership obligation; and that the decree should provide for the payment of the individual creditors in full, and the distribution of the balance of the assets among L. and the other firm creditors.

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LOCKWOOD V. CARR.

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DECEDENT, previously to the year 1876, was a co-partner with one, Lockwood, during the continuance of which relation the firm borrowed \$2,000, giving therefor a joint and several note, signed by each partner in his individual name, and by the mother of Lockwood, as makers. This note the latter was subsequently obliged to pay, for which payment she was never reimbursed by the firm. At various times, while the partnership was in existence, she also endorsed notes, for their accommodation, which were discounted by the banks, and some of which were, from time to time, renewed, she, however, being ultimately compelled to pay five of them. Upon the judicial settlement of the account of the administrator of decedent's estate, Mrs. Lockwood presented a claim for the amount paid by her in respect of these six notes.

L. E. CARR, *administrator, in person.*

C. C. CUDDEBACK, *for Sarah Lockwood.*

O. P. HOWELL, *and* JOHN W. LYON, *for creditors.*

THE SURROGATE.—The estate for distribution among the creditors amounts to about \$2,400. There are two classes of creditors: 1st, those whose claims are conceded to be individual, and which amount to about \$2,100, and, 2nd, those who are alleged to be creditors of the firm of Gray & Lockwood, of which the deceased was a partner, whose claims amount to over \$4,000. The individual creditors seek to exclude the firm creditors from participation in the assets of the estate, until they have been paid in full; while the



firm creditors claim to be entitled to share, *pro rata*, with the individual creditors in the distribution.

The matter has been complicated by a judgment of the Supreme court, entered upon the report of a referee in a reference under the statute, relating to disputed claims. The greater part of the so-called firm debts are held by a Mrs. Lockwood. Her claim was disputed by the administrator, and the claim was referred. On this reference the question of Mrs. Lockwood's right to share equally with other creditors in the distribution of the estate was submitted to the referee, and passed upon by him. He decided that she was. It is, however, now claimed that that decision is not binding upon the other creditors of the estate. I will, therefore, direct my attention first to that question.

The provision in the judgment is very general in its terms, but when taken in connection with the opinion and report of the referee, it is clear that the Supreme court, by the judgment, directs the payment of Mrs. Lockwood's claim *pro rata* with those of individual creditors. The proceeding in which that judgment was rendered is a statutory one, and only such matters could be submitted for determination as are provided for by the statute. "If the executor or administrator *doubt the justice* of any claim," then provision is made for a reference, "and the judgment of the court thereupon shall be valid and effectual in all respects, as if the same had been rendered in a suit commenced by the ordinary process" (2 R. S., 88, 89, §§ 36, 37). No provision is made by the statute for determination of any other matter than the justice of

the claim ; anything else, to be properly passed upon, must be incident and necessary to the determination of that question.

In this case, the referee had to determine whether Mrs. Lockwood's claim was a just one against the estate of Charles B. Gray, deceased ; and, to do that, he had to ascertain whether this claim was against Charles B. Gray individually, or against the firm of Gray & Lockwood ; and if the latter, then, that there were no partnership assets or solvent surviving partner so as to make it a claim in equity against the individual estate of the deceased partner. The referee, however, not only did all this, but he also decided how the claimant should share the estate with the other creditors. Now, did the administrator in that proceeding represent the individual creditors, so as to give the court jurisdiction over them ? If he did, did the referee have jurisdiction of the subject matter, so as to have the power to determine the rights of the different classes of creditors in the distribution of the assets ? If the answers to these questions are in the affirmative, then the judgment is conclusive, and cannot be questioned on this settlement ; the only means of review being by appeal (*Fisher v. Hepburn*, 48 *N. Y.*, 53).

But a court may enquire into the jurisdiction of any other court where the proceedings of the latter are relied upon, and brought before the former by the party claiming the benefit of such court's action. "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judg-

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LOCKWOOD V. CARR.

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ment, until reversed, is regarded as binding in every other court. But if it act without authority, its judgments are nullities" (Elliott v. Peirsol, 1 *Peters*, 511; Wilcox v. Jackson, 13 *Peters*, 511). "Jurisdiction is the power to hear and determine the subject matter in controversy between the parties to the suit" (State of R. I. v. State of Mass., 12 *Peters*, 718). "Jurisdiction does not relate to the rights of the parties, as between each other, but to the power of the court" (Peo. v. Sturtevant, 9 *N. Y.*, 263).

The Supreme court would have had jurisdiction, in an action brought for that purpose, to have determined the rights of the parties on a settlement in this estate; but I do not think it has, in such a proceeding as the one in which this judgment was entered. Mowry v. Peet (88 *N. Y.*, 456) is a case showing the limited power of the court in such proceedings. There, judgment had been entered in favor of the administrator, against the claimant, for the excess of the claim of the deceased over that of the claimant. It was held not to be within the scope of the statute, and that neither referee nor court had power to render such affirmative relief.

I will, therefore, now consider the nature of Mrs. Lockwood's claim. Upon the Farnum note of \$2,000, Mrs. Lockwood was an accommodation maker, or surety. She signed as joint maker with Gray & Lockwood, for their accommodation, and with a full knowledge of the facts, including the fact that the money was being borrowed on the note for the use of the firm of Gray & Lockwood in their jewelry business. When she so signed the note, a contract was

implied or raised on the part of her co-makers to indemnify her, or refund to her the amount she might have to pay in the transaction. Her right of action against them is not based upon the note she had paid to Farnum, for the note had answered the purpose for which it was drawn, and has been paid and cancelled, and she now holds it only as a voucher to be used in settlement with the other makers for whose accommodation she had signed (Edwards on Bills, 3rd ed., §§ 722, 723, 764). And her right of action against them is subject to any equities between them,—in other words it has not the characteristics of commercial paper, and does not entitle her, by subrogation or otherwise, to the rights which belonged to Farnum, as holder of the note.

The five other notes held by her, and which make up the rest of her claim, bear date in the years, 1881 and 1882. In these, she is payee and endorser, and they are signed by Gray & Lockwood with their individual names. They were all given in renewal of other notes, the originals of which were given some time prior to 1876, when the firm was dissolved, signed in the firm name, payable to and endorsed by her, to be discounted at the bank for the accommodation of the firm. The aggregate amount of them being at first more than at present, these original notes, as they became due, were paid in part by other notes of the same parties, which were in turn paid in like manner, until the notes now held by Mrs. Lockwood were paid and taken up by her. Does she now hold them as joint and several liabilities of the makers, as they, on their face purport to be, or do they still

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LOCKWOOD V. CARR.

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retain their original character as firm debts of Gray & Lockwood?

In *Jackson v. Cornell* (1 *Sandf. Ch.*, 348), it was held that an assignment, made by one partner of his individual property, by which he preferred the firm creditor, was fraudulent and void as to his individual creditors. In *Kirby v. Carpenter* (7 *Barb.*, 373), where a surviving partner had paid the firm debts, and claimed to be an individual creditor to the amount due him on account of such payments, it was held that the nature of the debts was not changed, that the surviving partner stood in the place of the original creditors. In *Ganson v. Lathrop* (25 *Barb.*, 455), the claimants held notes, signed "J. Ganson & Co.," by which the makers jointly and severally promised to pay, etc. The court held that the claimants were partnership, and not individual creditors. While these cases do not decide the character to be given the notes in this case, they do show a purpose of the courts to give that character to a debt which it originally had. In other cases, it is doubted whether it is in the power of the debtor to change the character of the debt to the prejudice of debtors of another class.

I think there can be little doubt but that all of Mrs. Lockwood's claims retain the character of partnership debts, so as to be capable of being enforced against partnership assets, if any existed, and I fail to see how they can at the same time, as against individual creditors, have the character of individual debts;—in the one case, by reason of the implied promise of the individual partners to pay what she

might suffer by reason of her having signed, for the benefit of the firm, the \$2,000 note, and in the other cases by their having renewed old partnership notes, after the dissolution of the partnership, signed in their individual names. I, therefore, conclude that all of Mrs. Lockwood's claim is made up of old debts of the firm of Gray & Lockwood.

At law, the partnership creditor may pursue both the joint and separate estates of the partners for the satisfaction of his debt, which at law is considered both joint and several. On the death of one of the partners, the legal right ceases against the deceased partner, and survives only against the surviving partner. A court of equity will, however, decree to joint (and partnership) creditors satisfaction of their claims, as against the *representatives* of the deceased partner, when, by reason of the insolvency of the firm and of the surviving partner, no other remedy exists (*Pope v. Cole*, 55 *N. Y.*, 124). But, as against the *individual creditors* of the deceased partner, when the estate of the latter is insufficient to pay both classes of claims, equity gives the individual creditors the prior right. For it is a general rule that partnership debts must be first paid from the partnership assets, and individual debts, in like manner, are to be first paid from the individual assets; and where there are insufficient partnership assets to pay the partnership debts, the partnership creditors can only look to the surplus of the individual assets, after the individual creditors have been satisfied. In the English courts, an exception has been established in cases where there is no joint estate and no solvent partner;

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LOCKWOOD V. CARR.

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—then the joint creditor is not postponed, but is permitted to come in ratably with the individual creditors. But this exception is not recognized by the courts of this State (*N. R. Bank v. Stewart*, 4 *Bradf.*, 254, and cases there cited; *Voorhis v. Childs*, 17 *N. Y.*, 354).

The case of *Pope v. Cole* (*supra*), upon which the counsel for Mrs. Lockwood relies, does not sustain his position, for in that case the effect of insufficient individual assets to pay individual creditors is not discussed. The court there decides what is necessary in order to *maintain* an action against the *representatives* of a deceased partner.

In distributing the assets of the deceased, in the hands of the administrator, the decree will, therefore, provide for the payment of the individual creditors first, in full, and after that, the balance to be distributed *pro rata* among the firm creditors, including Mrs. Lockwood. The expense of the reference allowed in the judgment must, however, be paid in full, before any distribution (*Columbian Ins. Co. v. Stevens*, 37 *N. Y.*, 536; *Shields v. Sullivan*, 3 *Dem.*, 296).

BRINK V. MASTERSON.

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ORANGE COUNTY.—HON. R. C. COLEMAN, SURROGATE.—June, 1886.

BRINK v. MASTERSON.

*In the matter of the judicial settlement of the account of the executors of the will of JACOB D. MASTERSON, deceased.*

*It seems, that a provision in a will, authorizing and empowering the executors to sell testator's real estate for the benefit of his legatees, effects an equitable conversion, and renders the proceeds of sale applicable to the payment of general legacies.*

The will of testator bequeathed his furniture to his widow, and gave to her the use of his house and the income of \$3,000, during her life, these provisions being declared to be in lieu of dower and other claims. It also gave to a daughter the income of \$4,000 during her life, and pecuniary legacies to other relatives. The ninth clause authorized and empowered the executors to sell the real property for the benefit of the legatees, and to apply the rents thereof, until sold, to the satisfaction of the annual claims of the wife and daughter. The personal property being absorbed in the payment of debts and expenses of administration, and the real property yielding only \$6,500, the daughter contended that the income of the latter sum should be divided between her and the widow in proportion to their legacies.—

*Held*, that the will charged the legacies upon the real property; and that, of the proceeds of the sale thereof, \$3,000 should be invested for the widow, and the balance for the daughter.

THE will of decedent, which was admitted to probate November 4th, 1881, gave to testator's wife, during her natural life, the use of his house and lot and the income of \$3,000. It also gave her his furniture. These legacies were in lieu of dower and any other interest given her by law in his estate. Testator also gave the income of \$4,000 to his daughter,



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BRINK V. MASTERSON.

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Frances E. Brink, during her life. He gave his son in law \$500, payable three years after his death, and his two grandsons \$500, each, when they were twenty-one years of age. After making several trusts he gave the residue to his grandchildren.

The ninth paragraph of the will was as follows :

“ I authorize and empower my executors hereinafter named to receive the rents and profits of any or all of my lands except my house and lot during the existence of my said wife's life interest therein, and apply such rents and profits to the use of my said wife and daughter so long, during their lifetime, as my executors may deem proper and expedient. Such rents and profits, however, so applied shall not be in addition to the bequests above given to my said wife and daughter, but shall constitute a part of their aforesaid annual income, to be paid to them respectively by my executors as aforesaid provided. And I further authorize and empower my executors to sell, for the benefit of my legatees, any or all of my real estate at such time or times as, in the exercise of their judgment, they may deem best.”

By the account filed in these proceedings by Samuel J. Masterson and another, executors, it appeared that the personal estate amounted to about \$600, which was not more than sufficient to pay the debts and expenses of administration; that the executors had sold all the real estate, except the house and lot left to the widow for life, and realized therefrom \$6,500 ; and that they had paid to the widow annual interest on \$3,000, amounting to \$640, and had paid less than \$200 to the daughter, as income.

It was objected by the daughter that the income of the estate, rents and interest should have been divided by the executors, *pro rata*, between her and the widow, in proportion to their legacies.

JOHN D. BRADNER, *for executors.*

JOHN L. WIGGINS, *for daughter.*

THE SURROGATE.—The bequest to the widow is a general legacy, and primarily could not be paid from the real estate, and, like other general legacies, would ordinarily abate or fail where there is insufficient personal property (*Babcock v. Stoddard*, 3 *T. & C.*, 207; *McCorn v. McCorn*, 100 *N. Y.*, 511). But being given and accepted in lieu of dower, it must be paid in preference to other general legacies, the widow being regarded as a purchaser for consideration (*Babcock v. Stoddard*, *supra*; *Isenhardt v. Brown*, 1 *Edw. Ch.*, 211).

The personal estate amounted to about \$600, which was not more than sufficient to pay the debts and expenses of administration; therefore, unless this legacy is charged by the will upon the real estate, or the proceeds of the sale of the real estate are in some way applicable to the payment thereof, it must fail entirely.

I am of opinion that the provision authorizing and empowering the executor to sell his real estate "for the benefit of my legatees," operates as an equitable conversion of the real estate, and, thus becoming personal estate, it was applicable to the payment of general legacies. But it is not necessary to rest on this

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BRINK V. MASTERSON.

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ground alone, because it can be fairly determined that the testator intended to charge the legacies given by his will upon the real estate, for the following reasons:—(1.) That intent is apparent in the words, “and I further authorize and empower my executors to sell, *for the benefit of my legatees*, any and all of my real estate.” (2.) The ninth provision of the will, authorizing the executors to apply the rents of the real estate, until sold, to satisfy the annual claims of the wife and daughter, contemplates a lack of personal property to invest, and recognizes the necessity of obtaining the fund to be invested for their benefit from the real estate. (3.) The testator must have known that there would be no personal property with which to pay legacies; and it cannot be thought that he meant to make bequests which would be idle words, but must rather be supposed that he meant and intended them to be good and substantial gifts, which they could only be by charging them on the real estate (*McCorn v. McCorn, supra*).

Having reached this conclusion by either of the methods mentioned, the proceeds of the sale of the real estate became applicable to the payment of the legacies, the widow's legacy retaining its right to priority.

The decree should direct the executors to set apart and invest, from the funds in their hands, \$3,000 for the benefit of the widow, and to invest the balance in their hands for the benefit of Mrs. Brink, and hereafter only the income derived from the investment made on their behalf shall be paid to either of them.

## 528 CASES IN THE SURROGATES' COURTS.

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TAYLOR V. SHUIT.

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ORANGE COUNTY.—HON. R. C. COLEMAN, SUBROGATE.—July, 1886.

TAYLOR v. SHUIT.

*In the matter of the judicial settlement of the account of MORGAN SHUIT and JAMES W. TAYLOR, deceased executors of the will of HUDSON McFARLAN, deceased.*

An inventory and account, filed by co-executors, though evidence of a joint possession of securities and receipt of moneys by them, is not conclusive so as to preclude proof that the same were in fact held and received exclusively by one of their number.

*Glaucus v. Fogle*, 88 N. Y., 434—explained.

The law does not make an executor a guarantor of the acts of an associate, in matters pertaining to their common trust, *e. g.*, in respect to making proper provision for the payment of legacies, but only requires of him reasonable diligence in seeing to it that duties imposed have been discharged.

*Remington v. Walker*, 99 N. Y., 626—distinguished.

Upon the hearing of a special proceeding instituted to compel an accounting, by the administrators of S. and T., two deceased executors, in respect of the proceedings of the latter, it appeared that the principal decedent, who died in 1873, by his will, had bequeathed \$11,000 to said executors, in trust for the benefit of a legatee for life, with remainder over; that T., who was an attorney in good standing, and extensively engaged in the business of lending money, had had the active management of the trust, and died insolvent, having misappropriated the bulk of the funds,—this being rendered possible by the circumstance that S., who was a farmer, had naturally been led to repose confidence in his co-executor and left the transaction of the business mainly to him. But the evidence failed to disclose any conduct, on the part of S., whereby T. was enabled to exercise greater rights, as to the custody of the property or receipt of money, than each of several representatives possesses by law. The account of the executors had been settled in 1880, when a decree was rendered determining that the funds of the trust had been invested by T., and were held by him, and in effect discharging S. from further liability.—

*Held*, under all the circumstances, that the estate of S. was not liable for the *devastavit* of T., but that the total deficit should be charged to the estate of the latter.

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TAYLOR V. SHUIT.

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HUDSON McFARLAN died in 1876. By his will he gave to his executors, in trust, legacies to the amount of \$11,000, for the benefit of Ann Yereance and her children, the interest to be paid to Mrs. Yereance during her life, and the principal to her children at her death.

About April 1st, 1880, the executors had an accounting before the Surrogate of Orange county, upon which a decree was made, settling the account as filed, and determining that the trust funds for those legacies had been invested by James W. Taylor, and the securities were held by him, and, in effect, discharging executor, Shuit, from any further liability. James W. Taylor died in 1883, and Morgan Shuit died in 1884. C. E. Cuddeback was appointed successor to the trust, and having ascertained that most of the trust fund had been wasted, proceedings were had, in which the decree was set aside as to Mrs. Yereance and her children, by reason of a failure to appoint a special guardian to represent the guardian, who were all minors, and for other reasons.

These proceedings were then instituted to compel the representatives of the deceased executors to render an account of the proceedings of said executors. The other facts sufficiently appear in the opinion.

C. E. CUDDEBACK, and L. E. CARR, *for petitioners.*

WADSWORTH & GOTT, and S. W. FULLERTON, *for administrators of Shuit.*

SCOTT & HIRSCHBERG, *for administrator of Taylor.*

THE SURROGATE.—Both executors are dead, and we are, therefore, without their testimony as to what

part each performed in the execution of this trust. Such information as we have has been derived principally from written documents, which are generally statements of results rather than of the manner in which such results were accomplished. For instance, the inventory shows the existence of certain securities, constructively in the joint possession of both executors, but not showing which of them took the actual possession; so their account on file shows constructively the joint receipt of moneys, and not who actually received and retained, or paid out the money. Of this, however, there is some evidence by the persons making payments, and the memoranda in the handwriting of Mr. Shuit.

While the inventory and account are evidence of such joint possession of securities and receiving of moneys, I do not consider them as controlling on that point so as to preclude inquiry by other evidence as to the actual fact. As I read *Glaucus v. Fogle* (88 *N. Y.*, 434), the court only held that the executors' account was sufficient evidence to sustain the finding of the Surrogate that the executor and executrix received and held the fund jointly, and not that the account was conclusive evidence of that fact. At the time the executors sought to have an accounting, they had completed their duties connected with the administration of the estate, except so much thereof as related to those legacies given the Yereance family, to be held in trust by the executors during the life of Mrs. Yereance. All the assets of the estate had been reduced to possession, all debts and expenses had been paid, and the general and residuary legacies

## TAYLOR V. SHUTT.

satisfied. It only remained to set apart and retain and invest, if not already invested, \$11,000 for this trust, for the benefit of Mrs. Yereance and her children. Did they do this?

By their account, it is made to appear that there remained of the estate securities to the amount of \$10,700, and cash, \$300, and also \$770 accrued interest, which had been paid over to Mrs. Yereance. As a fact, they should have had these assets, and the evidence shows that it all should have been in the possession of Judge Taylor, as follows:

• Knight Mortgage,	. . . . .	\$1,000
Taylor     ,,	. . . . .	400
Smith     ,,	. . . . .	1,000
Goshen Water Bonds,	. . . . .	2,300
Montgomery Town Bonds,	. . . . .	1,000
Stillman Mortgage,	. . . . .	2,500
Weatherbee Mortgage,	. . . . .	2,500
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		\$10,700
Cash,	. . . . .	1,070

The accrued interest was afterwards paid by Judge Taylor to Mrs. Yereance, together with interest which should have subsequently accrued up to April 1st, 1882. At his death only the following assets belonging to this estate were found and delivered to the successor in the trust:

Goshen Water Bonds,	. . . . .	\$1,000
Montgomery Town Bonds,	. . . . .	1,000
Taylor Mortgage,	. . . . .	400
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		\$2,400

The balance of the fund had been misappropriated

and wasted by Judge Taylor. His estate is conceded to be insolvent, and it is sought, on this accounting, to hold the estate of Mr. Shuit liable for the whole, or some part of the deficiency. The evidence shows that Mr. Shuit has accounted for all moneys belonging to this estate which have actually come into his hands. His liability, therefore, if any, must grow out of some wrong done, or duty omitted, with respect to that part of the estate which has been wasted by Judge Taylor.

It is claimed, in the first place, that Mr. Shuit is liable for not having properly invested the fund for the benefit of Mrs. Yereance and her children. Under the will, it was undoubtedly the duty of each executor, the estate being sufficient for that purpose, to see that these legacies were properly provided for, and the money invested for the benefit of the legatees. I do not think the law, in this regard, ordinarily makes one executor the guarantor of the other's acts, but it does require of him reasonable diligence in seeing to it that the duty imposed has been discharged.

I think the distinction between this case, and that of *Remington v. Walker* (99 *N. Y.*, 626), upon which the counsel for the legatees rely, is that while, in that case, there was a plain failure to make the investment for the required purpose, here the assets remaining could have been held for no other purpose. The residuary and other legatees had all been satisfied, and the interest which accrued thereon was only used for Mrs. Yereance. And, while, as I shall hereafter state, some of the securities were not held by Judge Tay-



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TAYLOR V. SHUIT.

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lor, as represented, still Mr. Shuit believed he did,—which, in my opinion, satisfied the law as to Mr. Shuit's duty.

It is further claimed that Mr. Shuit's conduct, in connection with certain of the assets of the estate, has been such as to create a liability. I will, therefore, consider the testimony as to each of them. The Knight and Smith mortgages, and \$1,000 of the water bonds, were collected by Judge Taylor, and not invested by him, unless the loan to Kescall of \$2,500 was from these moneys,—whether it was or not, he afterwards received the money on it, and did not reinvest it.

Now, as to Mr. Shuit's connection with these assets. The Knight bond and mortgage had, at one time, been in the possession of Mr. Shuit, and he had received and endorsed interest upon the bond. The principal and last payment of interest were, however, at his suggestion, paid by the mortgagee to Judge Taylor, to whom Mr. Shuit had, in the meantime, delivered the bond and mortgage. Although this mortgage appears upon the executors' account as being then held by them, it had, at that time, in reality been paid to Judge Taylor. There is no evidence that Mr. Shuit ever had the actual possession of the Smith mortgage, except as it may be inferred from his having received interest on it. The mortgage was foreclosed by Judge Taylor and he received the money due upon it. The water bonds remained in the bank where they had been left by the testator, and were never taken into the actual custody of either executor. One thousand dollars of them became due, and

were collected by the officers of the bank and placed to the joint account of both executors, but the money was drawn from the bank by Judge Taylor. At this time Mr. Shuit supposed his connection with the estate had ceased by reason of the settlement and decree, and there is no evidence to show that he knew of the collection of the bonds, or that the proceeds were placed to the joint credit.

Judge Taylor had an equal right with Mr. Shuit to receive the money on the Knight mortgage, and cancel the same, whether he had the possession of the mortgage or not. Mr. Shuit did no act which, in any way, enabled Judge Taylor to receive the money from the water bonds, and I fail to find any act, active or permissive, which gave to Judge Taylor a better or fuller right than he already had to receive the proceeds of either the Knight or Smith mortgages, or the water bonds. It is true, probably, that, if Mr. Shuit had not suggested payment of the Knight mortgage to Judge Taylor, it might have been paid to him, and he might, also, have taken such steps as would have secured the payment to himself of the Smith mortgage and the water bonds. Nothing, however, in Judge Taylor's situation or affairs, as then known, necessitated this course. At these times he was an attorney at law in the city of Newburgh, and down to the time of his death engaged in an extensive loaning business, while Mr. Shuit's occupation was that of a farmer,—circumstances which naturally and properly led to the course pursued.

The Stillman and Weatherbee mortgages never legally belonged to the McFarlan estate. I am,

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TAYLOR V. SHUIT.

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therefore, of opinion that no act of Mr. Shuit, in regard to them, created a liability. If the \$5,000, which, in the executors' account they are made to represent, came from the Vulcan mortgage, then, the only act, of which there is any evidence, done by Mr. Shuit in connection with that mortgage, was the execution of a satisfaction with Judge Taylor, after Judge Taylor had received the money. If these mortgages were made to stand for other moneys than the proceeds of the Vulcan mortgage, which Judge Taylor had collected, then we have no evidence of any act of Mr. Shuit's in connection therewith. Mr. Shuit undoubtedly knew that Judge Taylor had, or ought to have had, this sum of money, belonging to this estate, in some shape, either in cash, or in investments, but the circumstances only required from Mr. Shuit a knowledge on his part of the apparent discharge by his co-executor of his duty. He was not obliged to give that scrutiny and care which he would have, if they were investments he was making of the funds he held. By an examination of the papers he might have discovered that the assignments were in blank, but he had a right to rely upon his co-executor's legal knowledge, not having reason to suspect fraud.

The leading case, among the later decisions of our courts, in which the liability of one executor in cases of this kind, is passed upon is *Croft v. Williams* (88 *N. Y.*, 384). In the opinion, Judge FINCH, on page 389, says that the executor "must, in some manner, know and assent to the misapplication,—he must be a consenting party to the waste, or neglect some duty consequent upon his knowledge of a misapplication intended, or in progress. A wrong done, or a duty

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PULLMAN V. WILLETS.

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omitted, must lie at the foundation of his liability." Upon a careful consideration of the evidence, I have failed to see the wrong done, or the duty omitted on the part of Mr. Shuit, which made him liable to these legatees. I think this view is fully sustained in *Paulding v. Sharkey* (88 N. Y., 432), where one executor endorsed a check, given for the purchase price of real estate sold by them, payable to his order, and delivered it to his co-executor, who drew the money on it, and misapplied it, and yet the first was held not liable. In that case, the insolvent executor could not have obtained the money, except for the act of his co-executor; while, in this case, no act done by Mr. Shuit was necessary, to enable Judge Taylor to secure that part of the estate wasted by him.

I, therefore, direct, that the decree made upon this accounting charge the estate of James W. Taylor with the whole fund and interest which have been misapplied, and that the estate of Morgan Shuit be discharged.

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MONROE COUNTY.—HON. J. A. ADLINGTON, SURROGATE.—March, 1885.

## PULLMAN v. WILLETS.

*In the matter of the judicial settlement of the account of ABEL WILLETS, as administrator of the estate of MANUEL WILLETS, deceased.*

An executor or administrator will not, in an ordinary case, be allowed credit for counsel fees paid for professional assistance in preparing an

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PULLMAN V. WILLETS.

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inventory of the personal property of the estate, the statute contemplating that he and the appraisers will prove equal to that emergency. Nor can he charge his decedent's estate for the use of his own horse, on journeys made while transacting business appertaining to the administration, nor for food furnished, by himself, for himself or beast; though *semble contra*, if he should hire a hack or dine at an inn.

HEARING of objection to account of administrator of decedent's estate, in proceedings for judicial settlement.

J. N. BECKLEY, *for administrator.*

W. C. ROWLEY, *for Mrs. Pullman.*

W. D. SHUART, *for Walter Gage.*

THE SURROGATE.—Objection is made to the allowance of an item of \$120, paid to J. H. Chadsey for legal services. It appears from the evidence that the services in question were rendered by the attorney at the time of taking the inventory, and also that he instituted proceedings under Code Civ. Pro., ch. 18, tit. 4, art. 1, to discover property which the administrator claimed belonged to the estate but was withheld from him by Mrs. Pullman.

The charge made by Mr. Chadsey for his services seems to be reasonable, considering the time spent by him in the performance thereof. The administrator, having employed him to do professional work in his behalf, became personally liable to pay for the same (*Gilman v. Gilman*, 6 *T. & C.*, 214), but whether or not, having paid Mr. Chadsey's claim, he is entitled to have the same allowed to him out of this estate depends upon entirely different considerations.

2 R. S., 93, § 58, as amended by L. 1863, ch. 362,

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PULLMAN V. WILLETS.

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provides that "such allowance shall be made (to administrators) for their *actual and necessary* expenses as shall appear just and reasonable." Before it is proper, therefore, to allow expenses even actually incurred, it should appear that they were necessary, and also just and reasonable. In the present instance I can see no reason or necessity for the employment of an attorney to assist in making the inventory. The court appoints intelligent and competent men as appraisers, and they should seldom, if ever, require the presence and advice of legal counsel in the performance of their duty. I must, therefore, disallow \$20 of this claim. The remainder of the service, though fruitless, was perhaps, under the circumstances, necessary to protect the administrator from the charge of neglect of duty.

A second objection is raised to charges amounting to \$105.25, made by the administrator against the estate for the use of his own horse and carriage in going to and from his own home to the city of Rochester and other places, upon alleged business of the estate, and for food for himself and horse during such journeys. This objection must be sustained. It cannot be said strictly that the use of his own horse is an *actual expense* incurred by the administrator; and he would be quite likely to have different views of the necessity of making frequent journeys when he was to be paid for the use of his own horse in making them from what he would have if the money for such travel was to be paid to another. This is well illustrated in the present case. The estate was less than \$5,000, consisting chiefly of notes, bonds, and

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PULLMAN V. WILLETS.

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mortgages, and yet the estate is charged with the use of a horse and carriage for about fifty days. This is an unreasonable and excessive charge, in my view. The authorities are strongly against such a claim. An executor who is an attorney, and renders valuable legal services to the estate, can only be allowed the statutory commissions, and can receive nothing for his professional services, however meritorious or extraordinary they may have been (*Collier v. Munn*, 41 *N. Y.*, 143; *Campbell v. Purdy*, 5 *Redf.*, 434). The guardian of a minor cannot be allowed any compensation, beyond statutory commissions, for services to the estate, not even for his personal services as a mechanic in making repairs to buildings on the estate (*Morgan v. Hannas*, 13 *Abb. N. S.*, 361). Judge FOLGER says, in the opinion in that case, that the guardian should not be led into temptation to do anything for the mere sake of the compensation to accrue thereby.

An executor or administrator "can only charge the legal commissions and his just expenses. . . . He cannot charge for the hire of a horse when he drives his own, although he may charge for such hire when actually paid, or fare paid in a public conveyance. He cannot charge for board, when he dines at home or with a friend, although he may charge for board actually paid when from home on the business of the estate" (*McClellan's Ex'r*, 2nd ed., 106; *Everts v. Everts*, 62 *Barb.*, 581). "The policy of the law, it is apprehended, is against such a charge" (*Dayton's Surr.*, 540).

The administrator, in the present case, carried din-

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KINTZ V. FRIDAY.

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ner for himself and food for his horse with him on many of his journeys, and the evidence does not disclose what amount was actually expended for such entertainment, and there is, therefore, no basis for an allowance.

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A decree may be entered in accordance herewith.

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MONROE COUNTY.—HON. J. A. ADLINGTON, SURROGATE.—March, 1886.

KINTZ v. FRIDAY.

*In the matter of the judicial settlement of the account of HENRY P. GATES, as administrator of the estate of PHEBE W. GATES, deceased.*

Upon the judicial settlement of the account of the administrator of the estate of decedent, it appeared that the latter during her lifetime had taken from her daughter, K., a written agreement to pay annual interest upon \$800, moneys received by K. from decedent, and that this agreement had been surrendered to the daughter by decedent before her death. K. contended that this was done with an intent, expressed at the time, to cancel the debt.—

*Held*, that the issue thus raised was one which the court had no jurisdiction to try.

A construction of the English statute of *hotchpot*, grounded upon the ancient custom of London, is inapplicable to our law of "advancements."

*Holt v. Frederick*, 2 P. Wms., 356—disregarded.

An advancement is the *giving* by the intestate in his lifetime, by anticipation, of the whole or a part of what it is supposed the donee will be entitled to on the death of the party making it.

The provisions of 2 R. S., 96, §§ 75-78, relating to the mode of distribution of the personal property of intestates, and including the subject



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KINTZ V. FRIDAY.

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of advancements made by them to their children during their lifetime, though, in terms, applying to male decedents, govern as to the disposition of the estates of unmarried women and widows. Therefore, where a child of a deceased widow has "been *advanced* by the deceased, by settlement or portion of . . . . . personal estate, the value thereof" must be "reckoned with that part of the surplus of the personal estate which shall remain to be distributed among the children," as prescribed by Id., § 76.

HEARING of objections to the account of administrator of decedent's estate, in proceedings for judicial settlement.

M. H. BRIGGS, *for administrator.*

W. D. SHUART, *for Almy M. Kintz.*

THE SURROGATE.—This is a proceeding, instituted by Henry P. Gates, for a judicial settlement of his accounts, as administrator upon the estate of the above named decedent, who died in 1885, intestate, leaving personal property only. She had been a widow for some nine or ten years prior to her death, and left her surviving three adult children, Henry P. Gates, Almy M. Kintz and Sarah Friday. On the return of the citation the parties all appeared in open court, and the account of the administrator was filed, in which it is alleged, among other things, "that the said deceased, in her lifetime, made advancements or loans, to Almy M. Kintz, which, together with two notes made by Almy M. Kintz, . . . . . amount to about \$1,800; with which sum the said Almy M. Kintz should be charged upon the settlement of said estate, and the amount thereof deducted from any sum which would otherwise be found going to her."

The balance on hand for distribution is stated to be \$4,518.20.

Mrs. Kintz, by her counsel, denied that any sum had ever been advanced to her by the decedent, and upon the issue then made testimony was given on both sides. The evidence established, to my satisfaction, that the said Almy M. Kintz had received from her mother, between 1878 and 1883, the sum of \$1,800, none of which had been actually repaid. It appeared, however, that, to secure the repayment of \$500 of the last mentioned sum, she had given her mother her promissory note dated November, 1882, which the administrator still holds as a part of the assets of the estate. This note was included in the inventory, and admitted by Mrs. Kintz to be a valid obligation, the amount of which would be deducted from her share of the estate to be distributed. It further appeared that another written agreement was given by Mrs. Kintz to her mother, dated March 1st, 1882, to pay interest annually on \$800, and stipulating that unpaid interest, more than ninety days past due, should be added "to the principal for next year following."

This state of facts disposes, at the outset of \$1,300 of the alleged advancement. I think the evidence shows conclusively that the sums mentioned in the instruments above referred to, were loans, and not in the nature of advancements. The taking of an agreement to pay interest or to repay both principal and interest would tend to show that a loan had been made and not a gift. "An advancement is the *giving* by the intestate in his lifetime, by anticipation, of the

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KINTZ V. FRIDAY.

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whole or a part of what it is supposed the donee will be entitled to on the death of the party making it" (Grattan v. Grattan, 18 *Ill.*, 170). Taking a note, or a chattel mortgage, indicates a debt and not an advancement (Fennell v. Henry, 45 *Am. Rep.*, 88; West v. Bolton, 23 *Ga.*, 531; Batton v. Allen, 1 *Hal. Ch.*, *N. J.*, 103; Bruce v. Griscom, 9 *Hun*, 280; *aff'd*, 70 *N. Y.*, 612).

Prior to her death, Mrs. Gates surrendered the agreement for payment of interest on the \$800 to Mrs. Kintz, and the latter now maintains that this was done with an intent, expressed at the time, to discharge her from the debt and cancel the same. This is an issue which I have not the jurisdiction to try (Bauer v. Kastner, 1 *Dem.*, 136). It can only be determined in a proper action brought by the administrator, if he shall be advised so to test the question (72 *N. Y.*, 522).

The evidence seems to warrant a finding that the remaining \$500, which Mrs. Kintz was known to have received, was an advancement within the meaning of the statute (2 R. S., 97, §§ 76, 77, 78). The amount given was a considerable portion of the mother's entire estate. No evidence was offered tending to show that it was other than a gift. "If the amount given was large, it will be assumed to have been an advance, in the absence of proof to the contrary" (Bruce v. Griscom, 9 *Hun*, 280, 283; Grattan v. Grattan, 18 *Ill.*, 170). The sum so advanced should, therefore, be reckoned with the surplus remaining for distribution, in accordance with the statute, unless the legal objection to that course, now to be considered, is valid.

It is claimed, on behalf of Mrs. Kintz, that the provision of the statute in regard to advancements (R. S., §§ 76, 77, 78, *supra*) only applies to the distribution of the estates of *intestate fathers*, and is not, therefore, applicable to the present case. It is stated in Dayton on Surrogates, p. 563 (3rd ed.), that "this provision applies only to the distribution of the estates of intestate fathers, and, therefore, if a mother, being a widow, advances a child and dies intestate, leaving many children, the child advanced shall not bring what he received from his mother into hotchpot." Similar statements are found in Redfield on Wills (vol. 3, p. 248, par. 19), and in Williams on Executors (6th Am. ed., p. 1607). The only authority cited by these writers, in support of the foregoing proposition, is *Holt v. Frederick* (2 *P. Wms.*, 356). That is a case, decided by the Chancellor of England in 1726, in which the question now under consideration arose under the following circumstances: Maria Frederick, a widow, died, leaving two sons and a daughter, to the latter of whom she had given in her lifetime £1,000, which sum, upon the settlement of her estate, it was insisted, the daughter should bring into hotchpot. The statute of distribution then in force is partly quoted in the report, as follows: "If a *man* dies intestate, leaving a wife and children, the wife shall have a third and the children the two other thirds." Not enough of the provision, relative to advancement, is stated in the report to be intelligible, but it did not differ materially in principle from our own statutes (Dayton on Surr., 562, 563). The Chancellor ruled, "though without much debate," that the daughter

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KINTZ V. FRIDAY.

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should not bring the £1,000 into hotchpot, on the principle that the statute was grounded on the custom of London, which never affected a widow's personal estate, and that the act seems to include those alone within the clause of hotchpot who are capable of having a wife as well as children, which must be husbands only. I do not think that an ancient custom of London, the whole theory of which has become obsolete in our law civilization, should now control the interpretation of our statutes. The latter part of the Chancellor's decision is evidently based on a literal interpretation of the language of the statute above quoted.

The portion of our statutes providing for the distribution of the personal property of intestates (2 R. S., 96, § 75) also seems, for the most part, to have had in view the distribution of the estates of males only; but it was provided by Laws of 1830, ch. 20, § 16 (1 R. S., 7th ed., 124) that, "when in the Revised Statutes, or in any other statute, any party or person is described or referred to by words importing . . . . the masculine gender, . . . . females as well as males shall be deemed to be included;" and the strictness of construction of the statute of distributions which seems to have prevailed in *Holt v. Frederick* would, therefore, be no longer tolerated or permissible.

It has been the practice in all the Surrogate's courts of this State, since the Revised Statutes were adopted, to distribute the personal estates of single women and widows, as well as of men, dying intestate, in accordance with the provisions of § 75 above referred to,

and it has never been suggested that this practice was other than proper and lawful. Sections 76, 77 and 78 are evidently designed as a complement of that section, in all cases in which their application is needful, to secure equality among the children of an intestate parent.

My conclusion is, therefore, that the case of *Holt v. Frederick* is not an authority which should be regarded in the decision of this question; and I hold that the advancement of \$500, aforesaid, must be reckoned as a part of the surplus to be distributed under the statute.

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WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,  
SURROGATE.—July, 1886.

CLOSE v. SHUTE.

*In the matter of the estate of GILBERT SHUTE,  
deceased.*

The fact that administrators have rendered an account, in proceedings instituted by them to procure a decree directing the disposition of their decedent's real property for the payment of debts, is no answer to a petition, presented by a party entitled under Code Civ. Pro., § 2726, and praying for a judicial settlement.

While a Surrogate's court cannot recognize or enforce an attorney's lien for compensation for services rendered in a special proceeding therein instituted, the rule is otherwise as regards his lien on the amount of a judgment rendered against executors or administrators in another court,—the law (Code Civ. Pro., § 66) in such case operating an assignment *pro tanto* of the amount of the recovery, which must be regarded and respected.

The attorneys for one who had recovered a judgment in the Supreme court,

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CLOSE V. SHUTE.

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against the administrator of decedent's estate, for damages and costs,—*Held*, though not creditors of the decedent, to have such an interest in the estate, by virtue of their statutory lien, as to entitle them to institute a special proceeding under Code Civ. Pro., § 2726, to compel a judicial settlement of the administrator's account.

LETTERS of administration on the estate of decedent were granted to Peter Shute on July 27th, 1883. On March 23rd, 1885, David Mead and another, as executors of the will of Israel Peck, deceased, by Close & Robertson, their attorneys, obtained a judgment against the administrator, after a trial upon the merits, in the Supreme court, for \$2,207.50 damages, and \$201.63 costs. On April 13th, 1885, the administrator presented a petition, under the provisions of § 2750 of the Code, praying for a decree directing the disposition of the decedent's real property for the payment of his debts. The petition also contained a full account of proceedings of the administrator, setting forth also the unpaid debts (aggregating about \$2,700), the amount of personal property received, and a balance on hand of about \$357. On June 23rd, 1886, Close & Robertson presented a petition, in which they alleged that the costs of said action belonged to them, and also other necessary facts, and praying for a judicial settlement of the account of the administrator, and that a citation issue requiring him to show cause why he should not render and settle the same. The citation was issued accordingly.

CLOSE & ROBERTSON, *in person*.

HERMAN H. SHOOK, *for administrator*.

THE SURROGATE.—The first question presented for consideration is—what interest have Close & Robert-

son, the attorneys for the plaintiffs who obtained a judgment in the Supreme court against the administrator, in the estate which he represents. They are not creditors of the intestate. The costs they claim have accrued since his death. Of course, unless it shall appear that they have an interest in the estate they cannot institute this proceeding. I think, however, that they have such interest. The statute gives them a lien, in that court, on the amount of the recovery for their costs. While no such lien can be recognized for services rendered by an attorney in this court, as was held in the case of *Smith v. Central Trust Co.* (*ante*, p. 75), yet such a lien established elsewhere must here be regarded and respected. The law creating this lien of the attorney operates an assignment, *pro tanto*, of the amount of the recovery, and § 2743 of the Code directs the Surrogate to decree payment to an assignee of a claim. The petitioners are, therefore, considered proper parties to this proceeding.

The counsel for the administrator objects that his client should not thus be compelled to render an account of his proceedings again, inasmuch as he fully rendered such account in his application to dispose of the intestate's real estate for the payment of his debts. It is true that an account was thus rendered, but its sole object was to enable the petitioner to comply with the requirements of subd. 4 of § 2752 of the Code, and thus to show a necessity for the disposal of the real estate for the purpose of paying debts. No decree of distribution of the balance on hand could be based upon such an account. The



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DELAMATER V. M'CASKIE.

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parties to that proceeding were not cited to attend a judicial settlement thereof, but to show cause why a decree directing the disposal of the real estate should not be made.

As the personal estate is first liable for the payment of debts, funeral expenses and expenses of administration, it would seem to follow that there should be a judicial settlement of the accounts of the administrator, and a decree made distributing, *pro rata*, any balance which may be found in his hands, before proceeding to a decree for the sale of the real estate. How else can the Surrogate comply with subd. 5 of § 2759?

I refrain from entering upon other considerations springing from the subject, at this time, deeming the reasons stated sufficient to justify me in requiring the rendering of an account by the administrator.

Ordered accordingly.

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WESTCHESTER COUNTY.—HON. OWEN T. COFFIN,  
SURROGATE.—July, 1886.

DELAMATER v. McCASKIE.

*In the matter of the estate of HIRAM H. HAVENS,  
deceased.*

An attorney's claim to be remunerated for professional services, rendered to an executor in the administration of the estate of the decedent, being against the executor personally, he has no lien, in respect thereof, upon property of the estate which may be in his possession.

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DELAMATER V. M'CASKIE.

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Five thousand dollars and disbursements are too much to charge for procuring the admission of an uncontested will to probate.

The executrix of decedent's will having presented a petition, under Code Civ. Pro., § 2706, asking for the examination of one M., who she alleged had in his possession personal property, consisting of papers and securities belonging to decedent at the time of his death, of the value of more than \$10,000, the respondent, upon the return of the citation, filed an answer, under id., § 2710, setting forth that he was an attorney, who had performed certain work for the petitioner, as executrix, and claimed a lien for his services on the property in question; that he stated to her the terms on which he would undertake the probate of decedent's will, viz.: \$5,000 and disbursements, to which she made no objection; that respondent had conducted the probate, and demanded payment of said sum, which was refused; and praying that the proceedings be dismissed. It did not appear in what manner respondent had obtained the property which occasioned the dispute.—

*Held*, that the answer was insufficient to accomplish the object sought, by reason of its failure to allege, with respect to the property in his possession, that he was "entitled to the possession thereof by virtue of" a "lien thereon," and to set forth facts showing that there was a real question as to the right of possession; and that, accordingly, respondent must attend and be examined.

*Metropolitan Trust Co. v. Rogers*, 1 *Dem.*, 38<sup>t</sup> —followed.

THE deceased left a last will and testament which was duly admitted to probate, and of which Mary P. De Lamater was the executrix. On a petition presented by her, alleging that one Edward F. McCaskie had in his possession certain personal property belonging to the estate of the decedent at the time of his death, and of the estimated value of upwards of \$10,000, a citation was issued requiring said McCaskie to appear before the Surrogate, to be examined concerning the same. On the return day of the citation the parties appeared, and McCaskie filed a duly verified answer to such petition, in which he stated "that he is a counsellor at law, that he performed certain work for the said Mary P. De Lamater as executrix of said last will and testament, and

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DELAMATER V. M'CASKIE.

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claims an attorney's lien on the papers and securities named in said petition for such services;" . . . . .  
"that he stated to Mary P. De Lamater the terms on which he would undertake the probate of said last will and testament; that the amount so stated was \$5,000 and disbursements; that said Mary P. De Lamater made no objection to said terms, and allowed deponent to, and he actually did, conduct said probate; that a demand was made for said amount on Mary P. De Lamater, and refused." Whereupon he asked that said proceedings be dismissed.

LEXOW & HALDANE, *for petitioner.*

F. LARKIN, *for McCaskie.*

THE SURROGATE.—I have, in my time, had many strange cases submitted to me, but this is, in some respects the most remarkable that has come within my experience. Mr. McCaskie is a young man who, as it is understood, has been admitted to the bar within six months past and since the alleged arrangement was made, and yet he seeks to claim an amount for certain services rendered, which the most eminent lawyer at the bar, in this State, would scarce have the audacity to charge. The services for which this compensation is sought are, within the knowledge of the court, mainly derived from the papers in the case. There was no contest. There was no occasion for any extraordinary labor, and none was performed. A petition for the probate was presented, citations were issued and served on the proper parties, proof of due service was made, and on the return

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DELAMATER V. M'CASKIE.

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day the will was admitted to probate on proofs chiefly prepared by a person other than McCaskie, and there the services ended, for which he seeks to recover five thousand dollars! I regret that such a mistake should be made in the outset of a professional career, which should be honorable and useful, and crowned with that measure of success which follows intelligent and patient industry and fair dealing.

I am not at liberty to receive any counter affidavit from the executrix, but the mere assertion of such a contract as is alleged exceeds belief. Had the executrix agreed to pay any such sum for such services, she would, by that act, have shown herself incompetent to discharge the duties of the office to which she was appointed. Had she paid the sum, and credited herself therewith, it would be stricken out on the accounting, and a reasonable amount substituted.

His counsel claims that, inasmuch as an answer has been interposed under the provisions of § 2710 of the Code, as amended in 1881, all that remains to the court is to dismiss the proceeding, because that answer alleges that McCaskie has an attorney's lien upon the property to the extent of the \$5,000 he was to receive for his services. The statute says that, in case the person cited shall file an answer "*that he is entitled to the possession thereof*" by virtue of any lien thereon," the Surrogate shall dismiss the proceeding. There is no allegation in the answer that he is entitled to the possession of any of the property in controversy. This is material. If the

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DELAMATER V. M'CASKIE.

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property were wrongfully obtained, he is not entitled to the possession as against the executrix, and there can be no lien based upon a tortious possession. The property he holds consists of railroad bonds and stocks, promissory notes, bank stocks, coupons, etc. It is difficult to understand how the possession of such property, by an attorney, should be acquired or needed for the simple purpose of obtaining the probate of an uncontested will, any more than the possession of gold and silver plate, bank bills, a herd of cows, or a carriage and horses could be acquired and needed for such purpose. How he obtained them does not appear. It has been held (*Metropolitan Trust Co. v. Rogers*, 1 *Dem.*, 365) that where, in such a case, the party claims to be entitled to the possession of the property by virtue of any lien thereon or special property therein, he must allege the facts necessary to sustain the claim. He must make out, at least, a *prima facie* case. When he shall have done that, so that the court can see that there is a real question as to the right of possession, the Surrogate is then, and not until then, ousted of further jurisdiction, and must dismiss the proceeding. Here it is not done.

There is another reason why the proceeding should not be dismissed. If McCaskie has a just claim for services, it is not against the decedent or his estate, but against Mary P. De Lamater individually. The property in question is not hers. It belongs to the estate of Havens. How, then, can he have a lien upon the property of others for a debt which, he claims, she contracted?

DELAMATER V. M'CASKIE.

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The examination of McCaskie will, therefore, be proceeded with, unless he shall deliver up the property, the possession of which he admits; in which case there will be no necessity for further action in the matter.

# INDEX.

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## ABATEMENT OF LEGACY.

Testator died in October, 1878, leaving four children, him surviving, and a will, whereby he divided his residuary estate into fiftieths, which were bestowed, in specified proportions, upon those children and an institution bearing his name. The instrument also provided that "all moneys or indebtedness which shall appear upon any inventory or ledger or books of account" kept by him or under his direction, "charged as due" to him from either of the beneficiaries, during his lifetime, "and as an outstanding or unsettled account" at the time of his decease, should be deducted from the share or portion of the person concerned. It appeared that, for many years before his death, decedent was accustomed to keep formal books of account, containing a detailed record of his business transactions, and, during at least thirteen years preceding the execution of his will, had annually prepared a paper, styled by him an "inventory," showing the nature and value of his property. It was not seriously disputed that, under the circumstances set forth in those books and papers, a son, F., had received from testator \$20,000, and that the latter had expended, for the benefit of a daughter, J., \$50,000; none of which moneys had ever been restored to the estate. By numerous entries, *all made before the will was executed*, the testator had included these items in the list of his "assets," although they were generally afterwards deducted, from the "total assets," as "unproductive" or "unavailable property," leaving a balance which was described as "net" or "available assets," etc; while, in the "inventories" of 1871, 1874 and 1875, the same items were finally again added to the available assets, as "amounts due" from F. and J., and included in the "amount for distribution." Upon the day book of 1884, was an entry concerning the \$50,000 item expended for J., stating: "I charge the amount to her," etc.; and another to the effect that the \$20,000 had been "advanced to F., on account of his portion" of the estate.—*Held*, upon a view of the whole will, and the books and papers therein referred to, that the contested items represented an "indebtedness" to testator from F. and J., respectively, within the meaning of the will, and that their portions abated accordingly. *Matter of Robert*, 185.

## ACCOUNT.

Where executors have completed the performance of their duties as such, and are about to enter upon the discharge of functions imposed upon them as trustees under the will, their account should be fully and finally closed, and a sum, fixed and certain, set apart for them to hold in their new capacity, free from all charges. *Bacon v. Bacon*, 5.

SEE EVIDENCE, 2.

## ACCOUNTING.

1. Upon the judicial settlement of the account of the executrix and executor of decedent's will, a decree was rendered, directing the payment of about \$600 to the administrator of the estate of A., one of the beneficiaries under the will, who had died subsequently to the testator. The administrator having instituted proceedings to compel the payment to him of the sum so decreed, the executors sought to set off against this liability a demand representing the amount of an undertaker's bill incurred on account of the funeral expenses of such beneficiary. It appeared that F., the executrix, who was the mother of A., in the presence of A.'s husband, had given to the undertaker the directions for the burial, instructing him to spare no expense in respect thereto, with which instructions the latter had complied; and that, upon her refusal to pay the bill, an action had been brought, and a personal judgment recovered against her for the amount, which she paid, taking an assignment thereof to herself and her co-executor, in their representative capacity.—*Held*, 1. That F., by her officious interference in the matter of her daughter's burial, and by ignoring the rights and duties of the husband in the premises, relieved both him and the daughter's estate from the obligation otherwise imposed upon them by law; and became personally liable for the expenses in question. 2. That it was not competent for F., by procuring the assignment mentioned, to transmute the demand from one against herself, into one in the executors' hands against the estate of her daughter, and that, therefore, the counterclaim should be disallowed. *Quin v. Hill*, 79.
2. Where the general guardian of infant beneficiaries of a testamentary trust is in doubt whether, upon a discovery of all the facts, it may not be for the best interests of his wards to ratify rather than to repudiate acts of the trustees, who are accounting before the Surrogate's court, he may properly apply, under Code Civ. Pro., § 2735, for an order requiring the latter to attend and be examined touching the matter, previously to filing objections to the account. *Robert v. Morgan*, 148.
3. Where one of two executors presents his account for judicial settlement, as permitted by Code Civ. Pro., § 2729, his associate, who is required by that section to be cited to attend the settlement, is entitled to file objections, under the provision of § 2730, that "any party may contest the account with respect to a matter affecting his interest in the settlement and distribution of the estate." But attorneys claim-



ing to be creditors, in respect of services rendered to the executors, have no such standing. *Mead v. Willoughby*, 364.

4. Testator, by his will, appointed the executors trustees of twelve several trusts thereby created for the benefit of divers specified persons for life, with respective remainders over. Seven of these were accordingly set up by the executors, who, upon their accounting as such, in 1885, were directed by the decree to pay to themselves, as trustees, moneys requisite to constitute the funds for the remaining trusts. The trustees having presented twelve accounts for separate settlement, it was objected that they were to be treated as executors, simply, and that all their proceedings might properly have been set forth in a single account and be passed upon by a single decree.—*Held*, that the several special proceedings were duly instituted, and that a motion for their consolidation should be denied. *Held*, also, that the accounting parties were entitled to half-commissions upon the capital of the several trusts, for receiving the same from themselves as executors. *Frame v. Willets*, 368.
5. A controversy over the probate of decedent's will, during which the court appointed a temporary administrator of the estate, having terminated in a decree admitting the same, the administrator submitted his account for settlement.—*Held*, that the account should not be judicially passed upon, until letters testamentary had been issued, and the executors brought in as parties. *Bible Society v. Oakley*, 450.
6. The fact that administrators have rendered an account, in proceedings instituted by them to procure a decree directing the disposition of their decedent's real property for the payment of debts is no answer to a petition, presented by a party entitled under Code Civ. Pro., § 2726, and praying for a judicial settlement. *Close v. Shute*, 546.

See PERSON INTERESTED, 2; TEMPORARY ADMINISTRATOR, 2.

#### ACKNOWLEDGMENT.

See EXECUTION OF WILL; PUBLICATION OF WILL, 1, 2, 3, 4.

#### ADMINISTRATOR.

See EXECUTORS AND ADMINISTRATORS ; LETTERS OF ADMINISTRATION ; TEMPORARY ADMINISTRATOR.

#### ADMINISTRATOR WITH WILL ANNEXED.

1. The word, "principal," as used in Code Civ. Pro., § 2643, to describe a legatee who may be entitled to a grant of letters of administration with a will annexed, is the equivalent of "general," and means one who is neither specific nor residuary. *Quintard v. Morgan*, 168.
2. Where two or more persons are comprised within a class, to "one or more" of whom the Surrogate is required, by Code Civ. Pro., § 2643.

to issue letters of administration with a will annexed, no one of such persons has an absolute legal right to receive such letters; and, as between different claimants, he should be appointed who, *ceteris paribus*, has the greatest interest under the will. *Id.*

3. Where an infant would be entitled, but for his infancy, to letters of administration with a will annexed, the Surrogate is *required*, by Code Civ. Pro., § 2643, and 2 R. S., 75, § 33, to grant the same to his guardian, unless rendered incompetent by reason of the existence of facts specified in the statutes as a ground of disqualification. *Blanck v. Morrison*, 297.
4. The provision of Code Civ. Pro., § 2693, that "the proceedings to procure the grant" of the letters, "where all the executors . . . . . become incapable . . . . . or the letters are revoked as to all of them, . . . . . are the same as in a case of intestacy," does not change the order of priority among claimants of letters of administration, *c. t. a.*, established by *id.*, § 2643. *Hayward v. Place*, 487.

See ASSETS, 1 ; LETTERS OF ADMINISTRATION, 3.

#### ADVANCEMENT.

1. An advancement is the *giving* by the intestate in his lifetime, by anticipation, of the whole or a part of what it is supposed the donee will be entitled to on the death of the party making it. *Kintz v. Friday*, 540.
2. The provisions of 2 R. S., 96, §§ 75-78, relating to the mode of distribution of the personal property of intestates, and including the subject of advancements made by them to their children during their lifetime, though, in terms, applying to male decedents, govern as to the disposition of the estates of unmarried women and widows. Therefore, where a child of a deceased widow has "been *advanced* by the deceased, by settlement or portion of . . . . . personal estate, the value thereof" must be "reckoned with that part of the surplus of the personal estate which shall remain to be distributed among the children," as prescribed by *id.*, § 76. *Id.*

See HOTCHPOT.

#### AFFIDAVIT.

See DISCOVERY OF ASSETS, 4.

#### ALIEN.

See LETTERS OF ADMINISTRATION, 1; TESTAMENTARY TRUSTEE, 6.

#### ANCILLARY LETTERS.

1. The laws of this State, and the rules established by our courts, affecting the control and management of trust funds, govern, so far as they are applicable, with respect to property within the control of those tribu

nals, though the *cestuis que trustent* are residents of another state, and the custodian of the funds is acting under letters, issued here, ancillary to an appointment in the foreign jurisdiction. *Johnson v. Johnson*, 93.

2. Where, pending an application, by one "legally competent to act," for original letters of administration of the estate of an intestate who resided in another state at the time of his death, a domiciliary administrator asks that ancillary letters be issued to him, the court, under Code Civ. Pro., § 2696, subd. 2, though it has power, is not compelled to grant the prayer of the former, but may, in its discretion, issue letters, either original or ancillary, to the foreign representative. *Lussen v. Timmerman*, 250.

See REVOCATION OF LETTERS, 3.

#### ANNUITY.

Testator, by his will, devised and bequeathed the residue of his estate to the executors, in trust to pay, "out of the income thereof," to his widowed daughter, during her life, "the annual sum of \$1,600," in quarterly payments, on days named, directing the first payment to be made on the first quarter day occurring after his decease; and made provision for the accumulation of "any surplus or excess of said income, after paying said \$1,600 per annum," and lawful expenses,—with remainder over. Upon an accounting had after the lapse of several years, it appearing that deficiencies of income for certain years had been paid by the trustees out of the surplus received in others, it was, upon objection by certain remaindermen,—*Held*, that the annuitant was entitled to have all arrearages of lean years satisfied out of the income of after years that were full; and that the objection should be overruled. *Cochrane v. Walker*, 164.

See LEGACY.

#### ANSWER.

See DISCOVERY OF ASSETS, 2, 3, 4, 6 ; PAYMENT OF DEBTS, 1, 2 ; PAYMENT OF LEGACY, 2.

#### APPEAL.

1. Where the decree of a Surrogate's court has been reviewed by the Supreme court, and the matter remitted to the former with directions to proceed therein, it is for the Surrogate's court to decide as to the sufficiency, to stay its further action in the premises, of an undertaking given by a party, on appeal from the judgment of the Supreme court to the Court of Appeals. *Mead v. Jenkins*, 84.
2. An appeal, to the Court of Appeals, from a judgment of the Supreme court modifying a Surrogate's decree which determined the amount of a creditor's claim in a special proceeding for the disposition of decedent's real property, is not an "appeal taken from a judgment for a

sum of money, or from a judgment or order directing the payment of a sum of money," within the meaning of Code Civ. Pro., § 1327, relating to security upon appeal. That section contemplates an appeal from a judgment or order fixing upon the appellant a personal liability to pay a specified sum of money. *Id.*

3. Nor is such an appeal within the purview of Code Civ. Pro., § 1331, prescribing the security requisite to stay the execution of a judgment or an order "directing the sale of real property." *Id.*
4. Accordingly, where a party appealing from a judgment of the Supreme court, of the character mentioned, files a general undertaking, as prescribed by Code Civ. Pro., § 1326, "to the effect that he will pay all costs and damages which may be awarded against him on the appeal, not exceeding five hundred dollars," all further proceedings in the Surrogate's court are stayed during the pendency of such appeal. *Id.*
5. The operation of a decree revoking letters testamentary cannot be prevented, pending an appeal taken therefrom, by any undertaking given upon such appeal. To make the appeal effectual for any purpose, an undertaking in the sum of \$250 must be filed as prescribed by Code Civ. Pro., § 2577. *Fernbacher v. Fernbacher*, 227.
6. An order of a Surrogate's court, denying a motion for the simultaneous trial of different issues joined in a special proceeding pending therein, does not "affect a substantial right" (Code Civ. Pro., § 2570), and is not appealable. *Henry v. Henry*, 253.

#### APPORTIONMENT.

1. The Act, L. 1875, ch. 542—providing that payments of every description, made payable or becoming due at fixed periods, under any instrument executed, or (if a will) that shall take effect, after the passage thereof, shall be apportioned, upon the death of any person interested—does not apply to interest upon investments made under the will of one dying before the date indicated, though the instruments of security were executed thereafter. *Kinnan v. Card*, 156.

See COMMISSIONS, 9; FIRE INSURANCE; LIFE TENANT, 6.

#### APPRAISAL.

1. An appraisement of the personal property of a decedent, made without the previous posting of notice thereof, required by 2 R. S., 82, § 3, is invalid, vitiates the inventory, and entitles the appraisers to no fees. *Salomon v. Heichel*, 176.
2. There is a grave doubt as to the right of appraisers of the property of a decedent to interfere with the assets of a partnership of which he was a member, or to demand the production or exhibition thereof, for the purpose of including a statement of the decedent's interest, in the inventory required by statute. *Camp v. Fraser*, 212.

See INVENTORY.

## ASSETS.

1. A claim, touching which an action is pending in a court of the city of New York, in the name of a removed executor, is an unadministered asset of the decedent's estate, which gives to the Surrogate of that county jurisdiction to issue letters of administration with the will annexed. *Hayward v. Place*, 487.
2. The fact that the defendant in such action is the husband of one entitled to those letters, does not defeat the latter's right of priority under the statute. *Id.*, 487.

See **EQUITABLE CONVERSION**, 1 ; **FOREIGN EXECUTOR**; **INVENTORY**, 2;

## MARSHALING OF ASSETS.

## ASSIGNMENT.

See **JURISDICTION**, 12.

## ATTESTATION CLAUSE.

An attestation clause, which contains a conceded misstatement of fact as to one subscribing witness to a will, and not a word of which was read by, or to the other, cannot be resorted to by a proponent, to prop up a case weakened by the frailty of the witnesses' memory, respecting the formalities of execution. *Porteus v. Holm*, 14.

See **EXECUTION OF WILL**, 1.

## ATTORNEYS AND COUNSELLORS.

1. The question whether an attorney, who appeared for a party to a special proceeding in a Surrogate's court, which has been terminated by decree, was guilty of gross neglect to produce proper evidence on the hearing, is a matter between attorney and client, with which such court has nothing to do. *Olmsted v. Long*, 44.
2. The clause added, in 1879, to Code Civ. Pro., § 66,—enacting that, "from the commencement of an action, or the service of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision or judgment, in his client's favor, and the proceeds thereof, in whosoever hands they may come"—has no application to Surrogates' courts, since in those tribunals actions, and counterclaims therein, are unknown. *Smith v. Central Trust Co.*, 75.
3. *It seems*, that the lien, established by the clause quoted, is for the services of the attorney in the action, the value thereof being fixed by agreement express or implied; and is confined to actions for the recovery of money, or wherein a pecuniary demand is asserted by way of counterclaim. *Id.*
4. Upon an accounting by the successor of the executor of decedent's will, the attorneys who had appeared for two beneficiaries, G. and V., on,

an accounting by the executor, claimed a lien for their services on the amount of their clients' legacies, as determined by the decree entered in the latter proceeding, to the extent of \$1,000, beyond the costs awarded by that decree, and presented an affidavit setting forth that, about two years after the decree was entered, they had presented a bill for that sum to G., who had agreed to pay the same. This agreement was denied by G., in an affidavit averring that the attorneys had undertaken to perform the services in question for the amount of costs to be allowed by the decree.—*Held*, as matter of law, that no lien existed for the sum demanded by the attorneys, and that payment thereof could not be awarded, the court having no power to try the issues of fact presented by the affidavits. *Id.*

5. The attorneys for a defendant who has recovered a judgment for costs against an administrator, in an action brought by the latter, even though conceded to have an equitable lien thereon by reason of their professional services rendered in recovering the same, have no standing, as "creditors," under Code Civ. Pro., § 2717, providing for a summary application for payment of debts, etc.,—the term "creditor," as used in that section, applying only to persons to whom the decedent was indebted in his lifetime. *Hall v. Dusenbury*, 181.
6. As to whether an attorney for a party to an action has an equitable lien upon a judgment for costs recovered in his client's favor, in the absence of an express agreement as to compensation (Code Civ. Pro., § 66)—*quære*. *Id.*
7. While a Surrogate's court cannot recognize or enforce an attorney's lien for compensation for services rendered in a special proceeding therein instituted, the rule is otherwise as regards his lien on the amount of a judgment rendered against executors or administrators in another court,—the law (Code Civ. Pro., § 66) in such case operating an assignment *pro tanto* of the amount of the recovery, which must be regarded and respected. *Close v. Shute*, 546.
8. An attorney's claim to be remunerated for professional services, rendered to an executor in the administration of the estate of the decedent, being against the executor personally, he has no lien, in respect thereof, upon property of the estate which may be in his possession. *De Lamater v. McCaskie*, 549.

See ACCOUNTING, 8; COSTS, 2; JURISDICTION, 5.

#### BANK DEPOSIT.

1. Upon an administrator's accounting, the inventory and account presented an item of deposit in a savings bank, made by decedent, in trust for G., a party to the special proceeding, and one of decedent's next of kin, who was not aware of the existence of the deposit until after decedent's death, and in whose behalf objections were interposed to the jurisdiction of the court in the premises.—*Held*, 1. That the court had jurisdiction to try and determine the question of the validity of the

- trust, since, without such determination, the amount of the distributive share of each of the next of kin could not be fixed as required by statute (Code Civ. Pro., § 2743). 2. That such deposit *prima facie* created a trust in favor of the specified beneficiary, the presumption becoming conclusive by reason of the absence of proof of contemporaneous circumstances sufficient to change the character of the transaction. 3. That, decedent having been shown to have ceased, after a certain period, to draw interest on the deposit, she must be deemed to have abandoned the subsequently accruing interest to the donee of the principal. *Matter of Collyer*, 24.
2. *It seems*, that, where such a deposit is made, and the depositor draws interest from the first, continuously, as it accrues, during life, it is manifested that the original intention was to become trustee of the principal of the fund only. *Id.*
3. One S. died intestate, leaving, him surviving, his wife, the decedent, M., who was appointed administratrix of his estate, and died; whereupon petitioners were appointed administrators of her estate, while letters, *de bonis non* of S., were granted to the public administrator. During the lifetime of S. and M., deposits had been made in various savings banks, represented by six pass-books, standing in different names, and which, after the death of M., had come into the possession of one R., who delivered them to the public administrator. A special proceeding having been instituted by petitioners, under Code Civ. Pro., § 2706, to obtain possession of these books, there was no evidence as to the sources from which the moneys in question were derived.—*Held*, 1. That the claims to the deposits must be determined by the names appearing on the books; and, accordingly; 2. That two, originally in the name of S., and after his death, transferred to the name of "M., administratrix," should remain *in statu quo*. 3. That one, in the name of "S. for M." should be delivered to petitioners, the bank being responsible to them for the balance due to their intestate, at her death. 4. That one, in the names of "S. and M.," should be in like manner surrendered, the right of action, on the death of the former, vesting in the latter. 5. That the petition must be denied as to the remaining two, of which one stood in the name of "S. or M., either to draw," and the other in the name, "S. or M.,"—there being no reason, as regards these books, "to suspect that money or other property of the decedent" was "withheld or concealed by the person cited" (Code Civ. Pro., § 2712). *Gaffney v. Public Administrator*, 223.

See JURISDICTION, 1.

#### BENEVOLENT SOCIETIES.

See CHARITABLE BEQUESTS, 2.

#### BEQUEST.

See CHARITABLE BEQUESTS; LEGACY.

## BURDEN OF PROOF.

See INSANE DELUSION, 2.

CASES ADHERED TO, APPROVED, COMPARED, CRITICISED, DIS-  
APPROVED, DISREGARDED, DISTINGUISHED, EXPLAINED,  
FOLLOWED, MODIFIED.

- Andrews v. Goodrich, 3 Dem., 245—modified. *Frame v. Willets*, 368.  
 Blake v. Knight, 3 Curt., 547—compared. *Buckhout v. Fisher*, 277.  
 Baskin v. Baskin, 36 N. Y., 416—explained. *Buckhout v. Fisher*, 277.  
 Colligan v. McKernan, 2 Dem., 421—distinguished. *Collyer v. Collyer*, 53.  
 Cook v. Gregson, 2 Drewry, 286—followed. *Hardenberg v. Manning*, 437.  
 Cook v. Lowry, 95 N. Y., 103—distinguished. *Morgan v. Morgan*, 353.  
 Cornwell v. Cornwell, 1 Dem., 1—distinguished. *Haas v. Childs*, 137.  
 Dubois v. Brown, 1 Dem., 317—adhered to. *Matter of Collyer*, 24.  
 Dyer v. Erving, 2 Dem., 160—adhered to. *Matter of Robert*, 185.  
 Eisner v. Avery, 2 Dem., 466—disapproved. *Smith v. Central Trust Co.*, 75.  
 Glaucus v. Fogle, 88 N. Y., 434—explained. *Taylor v. Shuit*, 528.  
 Hill v. Nelson, 1 Dem., 357—approved. *Matter of Harris*, 463.  
 Holt v. Frederick, 2. P. Wms., 356—disregarded. *Kintz v. Friday*, 540.  
 Hynes v. McDermott, 91 N. Y., 451—distinguished. *Stanley v. Stanley*, 416.  
 Johnson v. Lawrence, 95 N. Y., 154—followed. *Bacon v. Bacon*, 5.  
 Mable v. Bailey, 95 N. Y., 266—followed. *Matter of Collyer*, 24.  
 Martin v. Funk, 75 N. Y., 134—followed. *Matter of Collyer*, 24.  
 McKie v. Clark, 3 Dem., 380—approved. *Bacon v. Bacon*, 5.  
 Matter of Accounting of Hawley, 100 N. Y., 206—explained. *Farmers' Loan & Trust Co. v. Hill*, 41.  
 Matter of Hewitt, 91 N. Y., 261—followed. *Matter of Case*, 124.  
 Matter of Kellogg, 7 Paige, 265—distinguished. *Phillips v. Lockwood*, 299.  
 Matter of Mason, 98 N. Y., 527—followed. *Frame v. Willets*, 368.  
 Matter of O'Hara, 95 N. Y., 403—distinguished. *Lynch v. Loretta*, 312.  
 Matter of Snyder, 34 Hun, 302—distinguished. *Rugg v. Jenks*, 105.  
 Mead v. Jenkins, 95 N. Y., 31—criticised. *Carman v. Brown*, 96.  
 Metropolitan Trust Co. v. Rogers, 1 Dem., 365—followed. *DeLamater v. McCaskie*, 549.  
 Mitchell v. Mitchell, 16 Hun, 97—explained. *Buckhout v. Fisher*, 277.  
 Peck v. Sherwood, 56 N. Y., 615—followed. *Matter of Housman*, 404.  
 Remington v. Walker, 99 N. Y., 626—distinguished. *Taylor v. Shuit*, 528.  
 Reynolds v. Parkes, 2 Dem., 399—compared. *Camp v. Fraser*, 212.



- Robert v. Corning, 23 Hun, 305; s. c., 89 N. Y., 241—explained. *Matter of Robert*, 185.
- Rogers v. Daniell, 8 Allen, 343—distinguished. *Matter of Robert*, 185.
- Smith v. Murray, 1 Dem., 34—distinguished. *Rudd v. Rudd*, 335.
- Stewart v. Chambers, 2 Sandf. Ch., 382—followed. *Cochrane v. Walker*, 164.
- Warner v. Durant, 76 N. Y., 133—followed. *Jones v. M. E. Sunday School*, 271.
- Younger v. Duffie, 94 N. Y., 535—distinguished. *Matter of Case*, 124.

### CESTUI QUE TRUST.

See TESTAMENTARY TRUSTEE ; TRUST.

### CHARITABLE BEQUESTS.

1. A legacy to a society, incompetent to take at the testator's death, because not then incorporated, is nevertheless effectual if not intended to vest until a later date,—at which the legatee has acquired a corporate character and is authorized to receive the benefit. *Jones v. M. E. Sunday School*, 271.
2. L. 1881, ch. 641, limiting the power of benevolent and other societies, organized under L. 1848, ch. 319, to take by will, and expressly subjecting them to the restrictions imposed by L. 1860, ch. 360, has not released them from that contained in the act of 1848, whereby they are rendered incompetent to receive a devise or bequest contained in a will executed within two months of the testator's death. *Wardlow v. Home for Incurables*, 473.
3. It seems, that the limitation, contained in the act of 1848, of the power of a person leaving a wife, child or parent, to devise or bequeath to a corporation formed thereunder, to one fourth of his estate, was repealed by the act of 1860, according to which one half of the estate may be disposed of in the manner mentioned. *Id.*

See WILL, 5.

### CODE OF CIVIL PROCEDURE.

[Sections construed or cited.]

- § 66. *Smith v. Central Trust Co.*, 75.
- § 66. *Hall v. Dusenbury*, 181.
- § 66. *Close v. Shute*, 546.
- § 829. *Stebbins v. Hart*, 501.
- § 885. *Camp v. Fraser*, 212.

- § 898. *Bull v. Kendrick*, 330.
- § 895. *Bull v. Kendrick*, 330.
- § 1310. *Henry v. Henry*, 253.
- § 1326. *Mead v. Jenkins*, 84.
- § 1327. *Mead v. Jenkins*, 84.
- § 1331. *Mead v. Jenkins*, 84.
- § 1822. *Salomon v. Heichel*, 176.
- § 1822. *Bowne v. Lange*, 350.
- § 1844. *Carman v. Brown*, 96.
- § 1865. *Collyer v. Collyer*, 53.
- § 2472. *Mackay v. Fullerton*, 153.
- § 2472, subd. 3. *Brennan v. Lane*, 322.
- § 2481, subd. 4. *Brennan v. Lane*, 322.
- § 2481, subd. 6. *Farmers' Loan & Trust Co. v. Hill*, 41.
- § 2481, subd. 6. *Olmsted v. Long*, 44.
- § 2514, subd. 11. *Schmidt v. Heusner*, 275.
- § 2530. *Matter of Leinkauf*, 1.
- § 2533. *Robert v. Morgan*, 148.
- § 2552. *Rugg v. Jenks*, 105.
- § 2558, subd. 3. *Collyer v. Collyer*, 53.
- § 2570. *Henry v. Henry*, 253.
- § 2577. *Fernbacher v. Fernbacher*, 227.
- § 2582. *Bible Society v. Oakley*, 450.
- § 2584. *Henry v. Henry*, 253.
- § 2614. *Gove v. Harris*, 293.
- § 2620. *Matter of Reynolds*, 68.
- § 2624. *Jones v. Hamersley*, 427.
- § 2638. *Postley v. Cheyne*, 492.
- § 2643. *Quintard v. Morgan*, 168.
- § 2643. *Blanck v. Morrison*, 297.
- § 2643. *Hayward v. Place*, 487.
- § 2647. *Canfield v. Crandall*, 111.
- § 2685. *Süsz v. Forst*, 346.
- § 2685. *Postley v. Cheyne*, 492.
- § 2685, subd. 2. *Fernbacher v. Fernbacher*, 227.
- § 2685, subd. 4. *Corn v. Corn*, 394.
- § 2689. *Becker v. Lawton*, 341.
- § 2689. *Bible Society v. Oakley*, 450.
- § 2690. *Baier v. Baier*, 162.
- § 2690. *Becker v. Lawton*, 341.

- § 2690. *Tilden v. Fiske*, 357.  
§ 2693. *Hayward v. Place*, 487.  
§ 2696. subd. 2. *Lussen v. Timmerman*, 250.  
§ 2706. *Public Administrator v. Elias*, 139.  
§ 2706. *De Lamater v. McCaskie*, 549.  
§ 2710. *Public Administrator v. Elias*, 139.  
§ 2710. *De Lamater v. McCaskie*, 549.  
§ 2712. *Camp v. Fraser*, 212.  
§ 2712. *Gaffney v. Public Administrator*, 223.  
§ 2715. *Vogel v. Arbogast*, 399.  
§ 2717. *Hall v. Dusenbury*, 181.  
§ 2718. *Süsz v. Forst*, 346.  
§ 2718, subd. 1. *Salomon v. Heichel*, 176.  
§ 2726. *Reilley v. Duffy*, 366.  
§ 2726. *Close v. Shute*, 546.  
§ 2729. *Mead v. Willoughby*, 364.  
§ 2730. *Mead v. Willoughby*, 364.  
§ 2735. *Robert v. Morgan*, 148.  
§ 2736. *Matter of Harris*, 463.  
§ 2743. *Matter of Collyer*, 24.  
§ 2750. *Carman v. Brown*, 96.  
§ 2804. *Moorhouse v. Hutchinson*, 362.  
§ 2805. *Moorhouse v. Hutchinson*, 362.  
§ 2814. *Baier v. Baier*, 162.  
§ 2814. *Tilden v. Fiske*, 357.  
§ 2815. *Adams v. Van Vleck*, 343.  
§ 2817. *Mackay v. Fullerton*, 153.  
§ 2817. *Adams v. Van Vleck*, 343.  
§ 2817. *Lane v. Lewis*, 468.  
§ 2818. *Lane v. Lewis*, 468.  
§ 2821. *Derickson v. Derickson*, 295.  
§ 2822. *Johnson v. Borden*, 36.  
§ 2832, subd. 4. *Corn v. Corn*, 394.  
§ 2832, subd. 6. *Mackay v. Fullerton*, 153.  
§ 2839. *Johnson v. Johnson*, 93.  
§ 2846. *Norton v. Sillcocks*, 145.  
§ 2858. *Mackay v. Fullerton*, 153.  
§ 3256. *Hanover v. Reynolds*, 385.  
Ch. 9, tit. 3, art. 2. *Henry v. Henry*, 253.  
Ch. 18, tit. 5. *Knickerbocker v. Decker*, 128.

## CODICIL.

See REVOCATION OF PROBATE ; REVOCATION OF WILL, 1, 2.

## COMMISSION.

See DEPOSITION ; STAY OF PROCEEDINGS.

## COMMISSIONS.

1. Executors who are also constituted trustees by their testator's will, cannot have commissions, in both capacities, at one time, upon one fund. *Matter of Leinkauf*, 1.
2. Where a will creates a trust in the executors, directing them to sell and convert the property, invest the proceeds, and apply the income to the use of designated beneficiaries, and their account is presented for settlement before completion of the performance of their executorial duties, only half commissions can be allowed upon proceeds of sale in their hands, the other half being awardable when those duties, with respect to the fund, are terminated, and the accounting parties enter upon the discharge of their functions as trustees. *Matter of Leinkauf*, 1.
3. Testator, who died in 1879, by his will, which nominated his wife executrix, and three other persons executors thereof, after bequeathing certain general legacies, which were made payable as soon as convenient after his decease, gave the residue to the executors, other than the wife, in trust for the benefit of the latter for life, with power to sell the real property—remainder over. This was the only provision for the widow, and was expressed to be in lieu of dower, thus entitling her to the income from the death of testator. It was further provided that, in case any of the trustees named died, resigned, or omitted to qualify and act, the other or others should select successors or substitutes, who were to have like powers, *upon qualifying*. In 1882, a decree was entered settling the executors' account, allowing them full commissions on the *corpus* of the fund, and, though not discharging the executors, directing them to pay over, to such of their number as were named trustees in the will, the residue of the estate, to be administered in accordance with the provisions of that instrument. The will, however, contained no such direction. The widow having died in February, 1885, the surviving executors again submitted their account for settlement and asked to be again allowed full commissions, as trustees, upon the principal fund.—*Held*, that the will created no separate trust, the terms, "executors" and "trustees," being therein employed, except as regarded the widow, interchangeably and as synonymous; that the effect of the decree of 1882 was merely to carry out the intention of the testator to place the residue in the hands of the executors other than the widow; and that the commissions asked for should not be allowed. *Bacon v. Bacon*, 5.
4. The temporary general guardian of an infant's property, on retiring from

office at the instance of his ward, who, having arrived at the age of fourteen years, petitions for the appointment of another in his place, is entitled to commissions upon the entire principal of the estate handed over to his successor. *Phillips v. Lockwood*, 299.

5. Testamentary trustees do not necessarily forfeit commissions by irregularities through which the *cestuis que trustent* have suffered no detriment. *Morgan v. Morgan*, 353.
6. Testamentary trustees who have received commissions at the rate of five, and two and one half; per cent. on a fund of \$10,000 or upwards, are nevertheless thereafter entitled to annual commissions, at the full rate, upon the income of each year, unless the will of their testator contains a provision inconsistent with such allowance. *Frame v. Willets*, 368.
7. The court will not seek to restrain, within the limits prescribed by our statute, the commissions of an executor accountable both here and in a court of another state, in view of the possibility that the other court might not coincide. *Matter of Colles*, 387.
8. Executors have no vested right to commissions, which remains unaffected by a statutory change of rate or proportion, taking effect after their services are rendered, and before entry of the decree whereby their compensation is fixed. *Matter of Harris*, 463.
9. In apportioning commissions among several executors, in the case of an estate exceeding \$100,000 in value, the provision of Code Civ. Pro., § 2736, directing a division of the aggregate award "according to the services rendered" by the recipients, respectively, requires that consideration should be given to the amount of time devoted by the executors respectively, to the affairs of the estate, and to the extent and importance of the labors which they have severally performed. *Id.*

See ACCOUNTING, 4; EXECUTORS AND ADMINISTRATORS, 5; PARTNERSHIP, 2.

#### CONSOLIDATION OF PROCEEDINGS.

See ACCOUNTING, 4.

#### CONSTRUCTION OF WILL.

1. The word, "indebtedness," is not exclusively a term of legal technicality, and does not always involve the idea even of pecuniary obligation. Like that of any other word used in a testamentary paper, its signification is open to construction; and it may be necessary to scrutinize the provisions of the testator's will, and even the condition of his estate, and his relations to the objects of his bounty, in order to ascertain the sense in which he has seen fit to employ it. *Matter of Robert*, 185.
2. The mere fact that one is a party to a controversy over the probate of a will in a Surrogate's court does not entitle him, under Code-Civ. Pro.

§ 2624, to insist that, before the entry of a decree according probate, the court shall pass upon all questions which he may see fit to raise, respecting the validity, construction or effect of the will, or of any of its provisions. *Jones v. Hamersley*, 427.

3. As regards the persons who may invoke and the occasions for invoking the jurisdiction of a Surrogate's court to construe wills and pass upon their effect and validity at the time of admitting them to probate, the section cited has effected no substantial change in the law existing before the passage of the Code (L. 1870, ch. 359, § 11). *Id.*
4. An occasion does not arise for the exercise of such jurisdiction under § 2624 unless, in accordance with the course and practice of the Supreme court, that tribunal would exercise its jurisdiction under similar circumstances. *Id.*
5. A testator gave his entire estate to his executors, in trust to receive the rents, issues, profits and income arising therefrom, and to apply the same to the use of his widow during her life; providing that upon her decease the estate should go to the male issue of one A., and that in the event that A. should die without leaving male issue, him surviving, the same should go to such charitable and benevolent corporations located in the State of New York, etc., etc., as testator's widow might, by her last will and testament, appoint.—*Held*, that, while the widow and A. were yet living, the Surrogate was not called upon, at the instance of any of decedent's next of kin, to pass upon the validity of that provision of the will which conferred the power of appointment. *Id.*

#### CONTEMPT.

1. The section of the Revised Statutes (2 R. S., 84, § 13), declaring that "the naming of any person executor in a will shall not operate as a discharge or bequest of any just claim which the testator had against such executor, but such claim shall be included among the credits and effects of the deceased, in the inventory, and such executor shall be liable for the same, as for so much money in his hands at the time such debt or demand becomes due, and the provision of Code Civ. Pro., § 2552, making "a decree directing payment by an executor . . . . to a . . . . person interested in the estate . . . . conclusive evidence that there are sufficient assets in his hands to satisfy the sum which the decree directs him to pay," do not authorize the punishment, as for a contempt, of an insolvent executor, who was indebted to the testator, at the time of his death, for a failure, owing to such indebtedness and insolvency, to discharge a legacy, payment whereof has been adjudged by a decree. *Rugg v. Jenks*, 105.
2. Especially should such a stringent remedy be refused where the legatee is a co-executor of the delinquent, and, though aware that the amount of indebtedness charged against the latter did not represent money actually in his hands, omitted to enforce the decree in his favor, as

legatee, until the indebted executor, who was originally able to pay became insolvent. *Id.*

See OBJECTION, 2.

CONVERSION.

See EQUITABLE CONVERSION.

CORPORATION.

See CHARITABLE BEQUESTS, 1, 2.

COSTS.

1. An unsuccessful *proponent* of a will is not entitled to costs, as of right, under Code Civ. Pro., § 2558, subd. 3, which withdraws the allowance thereof. in certain cases, from the Surrogate's discretion,—that subdivision being, by its terms, confined exclusively to contestants. *Collyer v. Collyer*, 53.
2. Different contestants of a will have a right to employ separate counsel, to protect their several interests; and where they pursue such a course, it is in the Surrogate's discretion to award them separate bills of costs, which may, in a proper case, be charged personally against the proponent. *Id.*

See DISBURSEMENTS.

COUNSEL FEES.

1. The court will not allow extraordinary compensation, by way of costs and counsel fees, out of an estate, on the application of the attorney for an accounting executor, upon the ground of trouble experienced by the former in consequence of his client's ignorance of bookkeeping and irregular method of keeping his accounts. Importunities in this behalf should be addressed to the executor, personally. *O'Reilly v. Meyer*, 161.
2. An item of expenditure, in the account of an executor, representing counsel fees paid for services rendered in the course of administration, will be cut down so as to exclude remuneration for the performance, by an attorney, of any duties incumbent upon the former personally, in view of his statutory commissions. *Raymond v. Dayton*, 333.

See INVENTORY, 4 ; PROBATE OF WILL, 4.

COUNTERCLAIM.

In order to warrant the allowance of a counterclaim against the liability of

an executor or administrator, on account of the estate which he represents, the debts must be mutual, and due to and from the same persons in the same capacity. *Quin v. Hill*, 69.

#### CREDITOR.

See ATTORNEYS AND COUNSELLORS, 5 ; PARTIES, 2, 3.

#### DEATH.

See PROBATE OF WILL, 1.

#### DECLARATIONS.

1. *It seems*, that declarations of a decedent, as to the existence of a will, are competent, while those relating to its destruction by him are inadmissible, as evidence of the *factum*, in a special proceeding for probate. *Collyer v. Collyer*, 53.
2. Declarations, by an alleged testator, that he did not want the government to get his property, and that he did not intend to leave anything to certain relatives,—*Held*, to imply an intention to make a will. *Stebbins v. Hart*, 501.

See PRESUMPTION.

#### DECREE.

See CONTEMPT ; DISCOVERY OF ASSETS, 5 ; JURISDICTION, 3, 4 ;  
REHEARING.

#### DEFINITIONS.

See ABATEMENT OF LEGACY ; ADMINISTRATOR WITH WILL ANNEXED, 1 ;  
ADVANCEMENT, 1 ; CONSTRUCTION OF WILL, 4 ; DISCOVERY  
OF ASSETS, 1 ; WILL, 3.

#### DEPOSITION.

1. A person attending before a referee to make a deposition, under Code Civ. Pro., § 885, to be used in a special proceeding in a Surrogate's court, cannot be cross-examined by counsel for a party opposed to those at whose instance the examination has been ordered, even where, by direction of the court, he has received notice of the time when such examination would be had. *Camp v. Fraser*, 212.
2. Although an application for a commission to take the deposition of a witness, under Code Civ. Pro., ch. 9, tit. 3, art. 2, relating to "depositions taken without the State, for use within the State," should not be denied because the moving affidavit fails to set forth facts and circumstances calculated to satisfy the court of the materiality of the witness sought to be examined, yet where an opposing party makes it appear that material testimony could not probably be elicited upon the exam-



ination, the applicant must disclose what facts he expects to prove. *Henry v. Henry*, 253.

3. The contestants of an alleged will of decedent, who died domiciled in the state of Illinois, having asked for an open commission to examine certain witnesses there residing, in the probate proceeding, to which infants, not next of kin to decedent, but who had an appearance of interest under the disputed instrument, were parties,—*Held*, that the latter must be deemed “adverse” parties, within the spirit of Code Civ. Pro., §§ 893, 895, and the request be denied. But it being subsequently shown that, under the foreign statute, those infants would take a greater share in intestacy than would be possible if the will were admitted, an open commission was allowed to issue. *Bull v. Kendrick*, 330.

#### DEVASTAVIT.

Upon the hearing of a special proceeding instituted to compel an accounting, by the administrators of S. and T., two deceased executors, in respect of the proceedings of the latter, it appeared that the principal decedent, who died in 1873, by his will, had bequeathed \$11,000 to said executors, in trust for the benefit of a legatee for life, with remainder over; that T., who was an attorney in good standing, and extensively engaged in the business of lending money, had had the active management of the trust, and died insolvent, having misappropriated the bulk of the funds,—this being rendered possible by the circumstance that S., who was a farmer, had naturally been led to repose confidence in his co-executor and left the transaction of the business mainly to him. But the evidence failed to disclose any conduct, on the part of S., whereby T. was enabled to exercise greater rights, as to the custody of the property or receipt of money, than each of several representatives possesses by law. The account of the executors had been settled in 1880, when a decree was rendered determining that the funds of the trust had been invested by T., and were held by him, and in effect discharging S. from further liability.—*Held*, under all the circumstances, that the estate of S. was not liable for the *devastavit* of T., but that the total deficit should be charged to the estate of the latter. *Taylor v. Shuit*, 528.

#### DEVISE.

See LEGACY; WILL.

#### DISBURSEMENTS.

An attorney having stipulated, for a consideration mentioned, “to give his legal services as the counsel or attorney of the administrators in the settlement of (decedent’s) estate, until the same is settled,”—the administrators agreeing that he should be repaid for “any and all *disbursements* made necessary on the settlement;”—on a motion for substitution, the former claimed to be reimbursed for \$250 paid by

him for services of counsel in the estate affairs.—*Held*, that the disbursements contemplated were those enumerated in Code Civ. Pro., § 3256 ; among which the one in question did not fall. *Hanover v. Reynolds*, 385.

#### DISCOVERY OF ASSETS.

1. In a case where the public administrator of New York county is in charge of an intestate's estate, not *virtute officii*, but under letters issued to him out of the Surrogate's court, the procedure under an application by him, for the discovery of property of such estate alleged to be concealed or withheld, is regulated by Code Civ. Pro., §§ 2706–2714, relating to such an application by executors and administrators, generally, and not by L. 1882, ch. 410, § 222, re-enacting R. S., part 2, ch. 6, tit. 6, § 8. *Public Administrator v. Elias*, 139.
2. Where an administrator, seeking to discover property of his intestate alleged to be concealed or withheld, alleges that the person to be cited has, in his possession or under his control, specified articles of property which were in the possession or under the control of intestate at the time of his death, an assertion by the respondent of his own title to a portion, only, of such property does not bar all further inquiry, under the provisions of Code Civ. Pro., § 2710, which directs that, "in case the person so cited shall interpose a written answer, duly verified, that he is the owner of said property, or is entitled to the possession thereof, by virtue of any lien thereon, or special property therein, the Surrogate shall dismiss the proceeding as to such property so claimed." *Id.*
3. And where, in response to an application by the administrator for an examination of decedent's widow, with a view to discovery of the whereabouts of certain U. S. bonds "of the value of about \$150,000," the respondent answered that decedent, during his life, gave to her from time to time, such bonds to the amount of \$135,000, whereof she returned to him, on different occasions, large numbers, of unknown value, for his temporary use, leaving in her possession, at decedent's death, an amount of the par value of \$30,000, and no more ; and that she was advised and believed that she was the owner of the bonds so retained, and of those so returned, if any, not disposed of by decedent before his death, and, as such owner, entitled to the possession thereof,—*Held*, that the examination must proceed. *Id.*
4. Whether an affidavit is an "answer," within the meaning of Code Civ. Pro., § 2710—*quære*. *Id.*
5. A decree made, in a discovery proceeding, pursuant to Code Civ. Pro., § 2712, "requiring the person cited to deliver possession of . . . property to the petitioner," must particularly describe and identify the property in question ; and it is not too late to take advantage of a defect in this regard, upon a motion to punish the respondent for contempt in disobeying its mandate. *Camp v. Fraser*, 212.

6. The executrix of decedent's will having presented a petition, under Code Civ. Pro., § 2706, asking for the examination of one M., who she alleged had in his possession personal property, consisting of papers and securities belonging to decedent at the time of his death, of the value of more than \$10,000, the respondent, upon the return of the citation, filed an answer, under id., § 2710, setting forth that he was an attorney, who had performed certain work for the petitioner, as executrix, and claimed a lien for his services on the property in question; that he stated to her the terms on which he would undertake the probate of decedent's will, viz.: \$5,000 and disbursements, to which she made no objection; that respondent had conducted the probate, and demanded payment of said sum, which was refused; and praying that the proceedings be dismissed. It did not appear in what manner respondent had obtained the property which occasioned the dispute.—*Held*, that the answer was insufficient to accomplish the object sought, by reason of its failure to allege, with respect to the property in his possession, that he was "entitled to the possession thereof by virtue of" a "lien thereon," and to set forth facts showing that there was a real question as to the right of possession; and that, accordingly, respondent must attend and be examined. *DeLamater v. McCaskie*, 549.

See BANK DEPOSIT, 3.

#### DISPOSITION OF REAL PROPERTY.

See SALE OF REAL ESTATE.

#### DISPUTED CLAIM.

1. The provision of Code Civ. Pro., § 1822, as amended in 1882,—prescribing a limitation of six months for the commencement of an action against an executor or administrator, after the dispute or rejection of a claim against the estate, exhibited to the latter "either before or after the publication of a notice requiring the presentation of claims,"—does not apply in favor of a decedent's personal representative who has omitted to publish such a notice. *Salomon v. Heichel*, 176.
2. A Surrogate's court has jurisdiction, in proceedings for the judicial settlement of the account of an executor, to determine whether there has been a "dispute or rejection," by the latter, of "a claim against the estate of the decedent," within the meaning of Code Civ. Pro., § 1822. *Bowne v. Lange*, 350.

See REFERENCE, 2.

#### DISTRIBUTIVE SHARE.

See EVIDENCE, 1; JURISDICTION, 2; NEXT OF KIN.

#### DOWER.

See LEGACY, 5.

## EQUITABLE CONVERSION.

1. Where a testator devises his real property to one for life, with a direction that, after the death of the latter, the same be sold, and the proceeds divided, such property does not constitute legal assets of the estate during the lifetime of the *cestui que vie*. *Carman v. Brown*, 96.
2. *It seems*, that a provision in a will, *authorizing and empowering* the executors to sell testator's real estate *for the benefit of his legatees*, effects an equitable conversion, and renders the proceeds of sale applicable to the payment of general legacies. *Brink v. Masterson*, 524.

See WILL, 1.

## EVIDENCE.

1. Upon a judicial settlement of the account of the administrator of decedent's estate, a decree was rendered in July, 1884, whereby the distributive share therein of J., a son of the intestate, against whom proceedings supplementary to execution were then pending before the county judge of Queens county, was fixed at \$212, which the administrator was directed to retain, subject to the order of a judge or court having jurisdiction in the premises. The supplementary proceedings resulted in an order of the county judge directing the administrator to pay the share in question to the sheriff of that county. Thereafter, J. applied to the Surrogate's court to open the decree so rendered, and amend the same by directing said share to be paid to himself, producing evidence that the judgment against him had since been satisfied of record.—*Held*, that, the only obstacle to the payment, to J., of his distributive share being the judgment referred to, and the evidence of the satisfaction of that judgment being conclusive upon the Surrogate's court, petitioner's application must be granted. *Smith v. Baylis*, 30.
2. An inventory and account, filed by co-executors, though evidence of a *joint* possession of securities and receipt of moneys by them, is not conclusive so as to preclude proof that the same were in fact held and received exclusively by one of their number. *Taylor v. Shuit*, 528.

See DECLARATIONS ; PRESUMPTION ; WITNESS, 2.

## EXECUTION OF WILL.

1. *It seems*, that, where an attestation clause intervenes between the proper provisions of a will and the sole subscription of the testator's name, such subscription may be regarded as made "at the end of the will," so as to satisfy the requirement of the statute in this particular. *Porteus v. Holm*, 14.
2. In applying the statute (2 R. S., 63, § 40), which prescribes the formalities essential to the execution of a will, the fourth subdivision of the section, providing that the attesting witnesses must sign their names *at*

*the end* of the instrument, should be as rigidly enforced as the first, which contains a like requirement respecting subscription by the testator. *Matter of Case*, 124.

3. The paper propounded as decedent's will was written on a half sheet of legal cap, the first page whereof contained the disposing portion, followed by the name of decedent and the beginning of an attestation clause, at the conclusion of which, on the next page, appeared the names of three subscribing witnesses ; next came an agreement signed by the legatee to support decedent and her husband during their natural lives ; then a clause nominating an executor, and finally a second subscription by decedent. It was contended that the matter preceding the witnesses' names might be deemed a complete and properly executed will ; but, the evidence showing that the entire document, with the exception of the several signatures, was written at one time,—*Held*, that the obvious intent of the decedent was that all the provisions of the paper should constitute her will, and that probate must be refused, on account of the witnesses' failure to sign their names at the end thereof. *Id.*
4. As to whether the result would have been different, had the portion of the instrument following the signatures of the witnesses been added after the earlier part was executed and attested—*quære*. *Id.*
5. The power of incorporating the contents of extraneous papers, by suitable words of reference in a will, is undoubted, and subject only to the limitations, that the party asserting such power to have been exercised must show the papers in question to have been in existence when the will was executed, and identify them as those to which the testator referred. *Matter of Robert*, 185.

#### EXECUTORS AND ADMINISTRATORS.

1. Decedent died intestate in 1865, leaving, him surviving, a widow and two infant children, and an estate which consisted exclusively of an interest in a partnership with a brother of his wife. Immediately after the death, the widow, though not yet appointed administratrix, arranged with the surviving partner for the retention in the business of decedent's share, the same to draw interest upon an agreed valuation, and the principal to be paid as soon as practicable. These terms were carried out by the partner, by the payment of interest, and, from time to time, instalments of the principal, until he became insolvent in 1874, in which year the widow took out letters of administration. The son resided with and was supported by the mother eleven years, until his death, and the daughter was in like manner provided for during sixteen years succeeding decedent's death. Upon an accounting had at the instance of the daughter, it was insisted, in her behalf, that respondent, by reason of having left decedent's interest in the partnership in the hands of her brother, and delayed to enforce the claim of the estate against him, should be charged with the value thereof;

also, that, not having been appointed guardian, she should not be allowed credit for any sums expended for the children's benefit.—*Held*, that, respondent's course in regard to the partnership assets appearing to have been performed in the exercise of a prudent discretion, the same should not be condemned as illegal; and, it being shown that a moderate allowance for the maintenance of the daughter from 1865 to 1880 would have absorbed the latter's entire interest in the estate, respondent was not chargeable with any balance of indebtedness. *Browne v. Bedford*, 304.

2. Upon an application by the administratrix of decedent's estate for an order restraining her associate in office from continuing to carry on the business in which decedent had been engaged during his lifetime, she alleging that the management of the business had been profitable to the estate, and that an early sale of the property therein employed was unadvisable,—*Held*, that the court ought not to interfere, but should leave those to whom the law had committed the estate to decide in their discretion what course to pursue, subject to the liability to be adjudged upon a settlement of their account. *Brennan v. Lane*, 322.
3. Whether co-administrators can lawfully enter into an agreement, which the court is bound to recognize, whereby one of them is to have the exclusive care and custody of their decedent's estate—*quære*. *Corn v. Corn*, 394.
4. The claim of an executor or administrator to be reimbursed for the just and reasonable expenses of administration, as provided by 2 R. S., 93, § 58, is paramount to the demands of any creditors. *Hardenberg v. Manning*, 437.
5. The right of testamentary *trustees* to retain, from time to time, in advance of an accounting, their commissions upon income received and paid out, is not in conflict with the established rule that *executors* cannot appropriate to themselves commissions, upon either principal or income, until the same have been awarded by a decree. *Matter of Harris*, 463.
6. The law does not make an executor a guarantor of the acts of an associate, in matters pertaining to their common trust, *e. g.*, in respect to making proper provision for the payment of legacies, but only requires of him reasonable diligence in seeing to it that duties imposed have been discharged. *Taylor v. Shuit*, 528.
7. An administrator cannot charge his decedent's estate for the use of his own horse, on journeys made while transacting business appertaining to the administration, nor for food furnished, by himself, for himself or beast; though *semble contra*, if he should hire a hack or dine at an inn. *Pullman v. Willets*, 536.

See COMMISSIONS; DEVASTAVIT; INVESTMENTS; JURISDICTION, 9; PUBLIC ADMINISTRATOR; REVOCATION OF LETTERS, 10.

**EXPENSES OF ADMINISTRATION.**

See EXECUTORS AND ADMINISTRATORS, 4, 7.

**FEEES.**

See COSTS; COUNSEL FEES; REFERENCE, 1.

**FIRE INSURANCL.**

Decedent's will gave the residue of her real and personal estate, including a dwelling house, to the executors, in trust to pay the net income to designated beneficiaries for life, and distribute the principal upon the death of the latter. The executors having, of their own motion, taken out policies of insurance of the house mentioned, which, in fact, enured to the protection both of the equitable life tenants and of the remaindermen,—*Held*, that the charge for the premiums should be apportioned between the two classes of beneficiaries, according to the values of their respective interests, as determined by the Northampton tables. *Matter of Housman*, 404.

**FOREIGN ASSETS.**

See MARSHALING OF ASSETS, 1.

**FOREIGN EXECUTOR.**

Testatrix died domiciled in Massachusetts, leaving no creditors in New York, and nominating different executors, as regarded personal property in the two states, respectively.—*Held*, that the executor for this State, after setting up certain trusts created by the will, and reserving a sum sufficient to cover the expenses of his administration, should transmit the remaining assets to the foreign representative, for distribution. *Clark v. Butler*, 378.

**FOREIGN GUARDIAN.**

See GENERAL GUARDIAN, 1.

**FOREIGN STATUTE.**

In the absence of evidence to the contrary, the Surrogate assumed that the statutes of a sister state, regulating the distribution of an intestate's personal property did not differ from those of New York. *Bull v. Kendrick*, 330.

See JURISDICTION, 11.

**FUNERAL EXPENSES.**

A husband is bound, as matter of law, to bury the body of his deceased

wife ; yet he may be allowed the funeral expenses out of her estate, if any. But a third person who unnecessarily interferes and gives directions as to the expenditures, becomes personally and ultimately liable for the amount thereof. *Quin v. Hill* 69.

See ACCOUNTING, 1.

#### GENERAL GUARDIAN.

1. Code Civ. Pro., § 2822, prescribing the contents of a petition, by an infant of the age of fourteen years, or upwards, for the appointment of a general guardian of his person or property, or both, justifies the Surrogate's court of a county wherein property of a non-resident infant of the requisite age is situated, in entertaining such an application in his behalf, independently of the law of any other state, or proceedings thereunder; although a regard to inter-state comity would suggest that, where a foreign guardianship of the person has been created and remains in force, the appointment should be confined to the property of the applicant. *Johnson v. Borden*, 36.
2. A petition by an infant, under Code Civ. Pro., §§ 2822, 2823, for the appointment of a general guardian of his property, should mention the amount of property to which the infant is entitled within this State, so as to enable the court to fix the penalty of the official bond. *Id.*
3. Where an infant of the age of fourteen years, or upwards, petitions for the appointment of a general guardian, and it appears that his father is a resident of a distant state, and that there exists such a feeling of antagonism between the two as to induce the belief that the petitioner's welfare will be best subserved by the appointment of another person, the claims of the father will be disregarded. *Id.*
4. The restrictions upon the authority of a Surrogate's court, to supersede the general guardian of an infant, imposed by Code Civ. Pro., § 2472, which permits the exercise thereof only "in the cases and in the manner prescribed by statute," enable the lawful incumbent of such an office successfully to resist an application for his removal until circumstances have been established which furnish a statutory warrant therefor. *Mackay v. Fullerton*, 153.

See JURISDICTION, 7 ; REVOCATION OF LETTERS, 3.

#### GUARDIAN.

See GENERAL GUARDIAN ; GUARDIAN AD LITEM ; TESTAMENTARY GUARDIAN.

#### GUARDIAN AD LITEM.

The provision of Code Civ. Pro., § 2530, requiring a Surrogate to appoint a competent and responsible person to appear, in a special proceeding, as special guardian for an infant party who does not appear by his



general guardian, is properly complied with upon the return day of the citation. An earlier application by an infant cited, for such an appointment in his own behalf, is premature. *Matter of Leinkauf*, 1.

### HOTCHPOT.

A construction of the English statute of *hotchpot*, grounded upon the ancient custom of London, is inapplicable to our law of "advancements." *Kintz v. Friday*, 540.

See ADVANCEMENT.

### IMPROVIDENCE.

See LIFE TENANT, 5.

### INCOME.

See COMMISSIONS, 6.

### INDEBTEDNESS.

See ABATEMENT OF LEGACY.

### INFANT.

1. A petition, by the father and general guardian of an infant, whose estate consists exclusively of a provision contained in the will of a mother, praying for the exercise, by a Surrogate, of the power, granted by Code Civ. Pro., § 2846, to direct the application of the infant's income to his support and education, should show the amount of net annual income likely to be earned by such testamentary provision, the station in life and accustomed style of living of the decedent's family, and the inability of the father to furnish the necessary means for the purposes mentioned. *Norton v. Sillocks*, 145.
2. An infant whose father is dead, and has an estate of his own, may be maintained out of the same, by the custodian thereof, without previous judicial authorization; and on a subsequent application to the court by the latter for credit in such behalf, his expenditures, if shown to be reasonable, will be allowed, even to the utter exhaustion of the principal. *Browne v. Bedford*, 304.

See ADMINISTRATOR WITH WILL ANNEXED, 8 ; DEPOSITION, 8.

### INJUNCTION.

Neither the grant of authority, contained in Code Civ. Pro., § 2481, subd. 4, to a Surrogate, to enjoin by order an executor or administrator, to whom a citation or other process has been issued, from acting as such until further order, nor the more general clause, *id.*, § 2472, subd. 3,

permitting him "to direct and control the conduct" of such officials, justifies an interference with the right of one of two executors, etc., to control and dispose of assets without the co-operation of his associate, merely because of a disagreement between them as to the time when, or circumstances under which, the same can most advantageously be exercised. *Brennan v. Lane*, 322.

See EXECUTORS AND ADMINISTRATORS, 2.

### INSANE DELUSION.

1. Evidence of the existence of insane delusions, in the mind of an alleged testator, is not countervailed by proof of the possession of business capacity in ordinary transactions. *Morse v. Scott*, 507.
2. Upon proof of a delusion naturally affecting the testamentary act, the onus of showing that the former did not exist when the latter was performed is thrown upon proponents. *Id.*
3. Decedent, who died at the age of eighty years, unmarried, and leaving him surviving a sister, nephews and nieces, grew up a farm laborer, never learned to read or write, had naturally a weak and superstitious mind, and often exhibited eccentricities of behavior, though his physicians and bankers testified that he was rational and shrewd in his business transactions. In middle-life, he became possessed with a dominating purpose to cause his body to be preserved to the end of time, to effectuate which he purchased a metallic coffin, declared by him to be made of wood and iron melted together, built a vault upon his farm for its reception, and, because his relatives would not survive for the requisite period, bestowed his entire property upon the trustees of a church, though himself neither philanthropic nor religious, as an inducement to them to undertake the trust of perpetually caring for his resting place and remains.—*Held*, upon all the evidence as to testator's life, character, and declarations, that the will, though perverse and unreasonable, in view of his ties of relationship, could not be rejected upon that ground; but that probate must be refused for the reason that, at the time of execution he was controlled by the insane delusion that his body was to be preserved during all time. *Id.*

### INTEREST.

1. Testator, who died August 1st, 1881, left a will bequeathing \$10,000 to his nephew, D., who, on January 23rd, 1875, had given to the former his promissory note for \$5,000, with interest annually, and upon which interest was subsequently paid, up to January 23rd, 1881. A codicil to the will directed that there be deducted from the bequest to D., who had died, *the amount due testator from him and his estate*, and that the balance be distributed among his children. A question having arisen as to the proper method of computing interest upon the note, in making the deduction required,—*Held*, that the amount paya-

ble on the legacy, August 1st, 1882, should be ascertained by deducting, from \$10,000, the principal of the note, plus interest thereon to the day of testator's death. *Dickerson v. Stokes*, 219.

2. Trustees who employ, in their own business, the funds held by them in a fiduciary capacity, will at least be held accountable for the highest legal rate of interest thereon; and the stringency of this rule will not be relaxed in consideration of the fact that the fund has at all times been protected against loss by reason of the misappropriation. *Morgan v. Morgan*, 353.
3. The rate of interest to be exacted from trustees, upon funds which they have failed to invest within a reasonable time, depends upon the circumstances of each case, and cannot be determined by an unvarying rule. *Id.*
4. No exception to the ordinary rule—that a legacy, in general, begins to bear interest only at the expiration of a year from the testator's death—is created by the fact that a sum has been bequeathed to one for life, with remainder over; or that the life beneficiary is a *cestui que trust*; or that executors are expressly allowed, in their discretion, to apply interest of a trust fund to the maintenance of an infant beneficiary, during minority. *Clark v. Butler*, 378.
5. A bequest of a fund to executors, in trust to accumulate the income during the minority of a legatee, to whom the principal and accumulation are made payable on his arriving at full age, entitles the beneficiary to interest from the testator's death, where he is of age when that happens, or from the date of his reaching majority, where the same occurs within a year thereafter. *Id.*
6. A legacy drawing interest draws interest at the statutory rate. *Id.*

See OBJECTION, 3.

## INVENTORY.

1. The statutes (2 R. S., 82, § 2, *et seq.*, and Code Civ. Pro., § 2715) regulating the proceedings for the preparation and return of inventories, do not contemplate interference, by legatees or next of kin of a decedent, with the action which executors and administrators, aided by appraisers, are required to take. *Vogel v. Arbogast*, 399.
2. The proper practice, under Code Civ. Pro., is to postpone, until an accounting, all disputed questions respecting the existence or valuation of a decedent's assets. *Id.*
3. Therefore, where, after the entry, upon the application of administrators, of an order directing an appraisal of such of decedent's assets as had come to their knowledge, the next of kin asked that they be required to produce certain papers for the assistance of the appraisers, and the administrators alleged that they had already submitted to the appraisers a true and full statement of all the assets,—*Held*, that the

issues thus raised could not then be brought to trial, and that the relief sought should be refused. *Id.*

4. An executor or administrator will not, in an ordinary case, be allowed credit for counsel fees paid for professional assistance in preparing an inventory of the personal property of the estate, the statute contemplating that he and the appraisers will prove equal to that emergency. *Pullman v. Willets*, 536.

See APPRAISAL; EVIDENCE, 2.

### INVESTMENTS.

Executors of a will, which appoints them trustees of a trust thereby created, though not justifiable in retaining, beyond a period reasonably requisite for their conversion, securities found among testator's assets, unsuitable for trust investments, will not be directed to dispose thereof, at the instance of an objector to the account filed by them as trustees, where no damage to the estate is shown to have been caused by the retention. The aggrieved parties should apply for the removal of the accounting parties, under Code Civ. Pro., § 2817, or proceed under *id.*, § 2815, to procure the protection of a suitable bond. *Adams v. Van Vleck*, 343.

See APPORTIONMENT, 1.

### JOINT LETTERS.

See LETTERS OF ADMINISTRATION, 1.

### JUDGMENT CREDITOR.

Although the lien acquired by a judgment creditor, by the commencement of proceedings supplementary to the execution, is not divested by the death of the debtor, it cannot be enforced, in a Surrogate's court, against the assets of the estate of the decedent, unless, during the lifetime of the latter, the creditor procured the appointment of a receiver, or an order directing the application of the debtor's property in satisfaction of the judgment. *Billings v. Stewart*, 265.

See PAYMENT OF DEBTS, 1, 4.

### JUDICIAL SETTLEMENT.

See ACCOUNTING; EXECUTORS AND ADMINISTRATORS; GENERAL GUARDIAN; TESTAMENTARY TRUSTEE.

### JURISDICTION.

1. The administrator of decedent's estate included in his inventory, and proposed to account for, as assets of that estate, seven items consisting of sums deposited in savings banks, and entered upon the pass books as follows: "Bank Book No. ———, ——— Bank, in account

with" (decedent) "in trust for A. B. . . . . \$ ———." The *cestuis que trustent* were not parties to the accounting proceeding, and did not ask leave to intervene, but an attorney in their behalf filed objections, of which the purport was a contention that those sums were not assets, and that the court had no jurisdiction to try and determine the question of the validity of the trusts.—*Held*, that, the parties in interest not being before the court, their rights could not be adjudicated; that, for the same reason, the objections, as such, must be disregarded; but that, the court having received notice of the claims, the decree should direct the administrator to retain funds to meet the exigencies of any actions which might be brought and prosecuted in a proper forum. *Matter of Collyer*, 24.

2. *It seems*, that a Surrogate's court has no power to try and determine the question—whether there has been a breach of a contract, made by one not a party to the proceedings, to assign a judgment against one of the distributees of an intestate's estate, subject to its jurisdiction—where a contest arises as to the proper method of disposing of such distributee's share. *Smith v. Baylis*, 30.
3. Notwithstanding the increased dignity of Surrogates' courts, which were constituted courts of record in 1877, they still remain tribunals of special and limited jurisdiction, and have no power, where a determination has been once made by them, to review it upon a pure question of law. *Farmers' Loan and Trust Co. v. Hill*, 41.
4. Code Civ. Pro., § 2481, subd. 6, which permits Surrogates' courts to open, vacate and modify their own decrees and orders, etc., was framed mainly in order to expressly confer upon those tribunals powers which it had been held that they incidentally possessed. *Id.*
5. A claim, by an attorney against his client, for services rendered to the latter in a special proceeding in a Surrogate's court,—based upon an alleged agreement to pay the sum demanded, which the client denies,—raises an issue for a jury, and which that court is incompetent to try. *Smith v. Central Trust Co.*, 75.
6. Upon an application to the Surrogate's court of Westchester county for the probate of a will, it appeared that decedent, whose domicil of origin was in the county of Putnam, had removed to the former county and resided therein until 1872, when she returned to Putnam where she resided ten years; that, in 1882, she was adjudged a lunatic by the Putnam county court, and H., a resident of Westchester, was appointed committee of her person; and that H. at once took the decedent to live with her at the home of the former, where she died in 1886.—*Held*, that the legal residence of decedent, at the time of her death, was in Westchester county, and that the Surrogate's court thereof had jurisdiction to take proof of her will. *Hill v. Horton*, 83.
7. A Surrogate's court, having, by virtue of Code Civ. Pro., § 2821, authority with respect to the appointment of a general guardian, as extensive as that which might formerly have been exercised by the Chancellor,

- may, as a condition of awarding the custody of an infant to an applicant for letters, require the latter to permit access to his ward by such persons as the court may designate. *Derickson v. Derickson*, 295.
8. A Surrogate's court has jurisdiction to entertain and adjust a claim for past maintenance of an infant. *Browne v. Bedford*, 304.
  9. The authorities defining the power of the courts to control the conduct of executors and other trustees in exercising the functions of their office—reviewed. *Brennan v. Lane*, 322.
  10. For the determination of a contest between the beneficiary of a testamentary trust, claiming payment of a balance of income, and the executor, trustee, asserting a right to withhold the same and apply it upon a debt alleged to have been due from the former to testator at the time of his death,—the existence of the debt, as well as of a surplus of income, being in dispute,—the parties must resort to a tribunal other than a Surrogate's court. *Rudd v. Rudd*, 335.
  11. Whether claimants of a legacy under the will of a non-resident decedent, whose personal representative is accounting in this State, are entitled thereto according to the statutes of the state of decedent's late residence, is a question which may lawfully be determined here; though the court has a discretion as to remitting the controversy to the domiciliary tribunal. *Clark v. Butler*, 378.
  12. Upon a judicial settlement of the account of a testamentary trustee, preliminary to a final distribution of the principal of the trust, it appearing that one of the *cestuis que trustent* had executed to another, since deceased, an assignment, absolute upon its face, of his entire interest in the estate, the assignor submitted an affidavit setting forth that the instrument was intended by the parties thereto, merely as collateral security for a loan.—*Held*, that, in the decree to be entered upon the accounting, the assignment must be recognized as valid, the Surrogate's court having no jurisdiction either to reform it, or to pass upon any equitable claim of the affiant against the representative of his assignee. *Young v. Purdy*, 455.
  13. Any court may inquire into the jurisdiction of any other, where the proceedings of the latter are brought before it by a party claiming the benefit thereof. *Lockwood v. Carr*, 515.
  14. Upon the judicial settlement of the account of the administrator of the estate of decedent, it appeared that the latter during her lifetime had taken from her daughter, K., a written agreement to pay annual interest upon \$800, moneys received by K. from decedent, and that this agreement had been surrendered to the daughter by decedent before her death. K. contended that this was done with an intent, expressed at the time, to cancel the debt.—*Held*, that the issue thus raised was one which the court had no jurisdiction to try. *Kintz v. Friday*, 540.

See ASSETS, 1 ; BANK DEPOSIT, 1 ; DISPUTED CLAIM, 2.

## LEGACY.

1. An adult legatee, who is entitled to receive, as such, a specified sum, "in government bonds," may elect to take the same in money. *Matter of Newman*, 65.
2. Testator, by his will, having bestowed the use of all his property upon his wife for life, gave legacies, to take effect on her death, of \$2,000 to C., and, of \$1,000 to each of three nephews, the sums being given, in each case, "in government bonds." Testator left government bonds, to the amount, at par, of \$4,000, only.—*Held*, 1. That, as testator neither bequeathed *his* government bonds, nor made the legacies payable out of the same, they were neither specific nor demonstrative, but general legacies payable in a specified manner, and were all subject, with other general legacies, to *pro rata* abatement, in case of a deficiency of funds, except as otherwise provided by the will. 2. That such legacies should be satisfied, by the executor, by investing the requisite sums in government bonds, so far as they would go, and delivering such bonds to the legatees. *Id.*
3. A member of a religious order who, as such, has taken the vow of poverty is legally competent to receive a bequest, and hold and dispose of the same for his individual benefit. *Lynch v. Loretta*, 312.
4. Under a bequest to one for life, with remainder over, if the particular beneficiary die before testator, the remainder takes effect at the latter's death. This rule applies, although the will gave trustees a discretion to devote the entire principal to the use of the life legatee. *Sauter v. Müller*, 389.
5. The will of testator bequeathed his furniture to his widow, and gave to her the use of his house and the income of \$3,000, during her life, these provisions being declared to be in lieu of dower and other claims. It also gave to a daughter the income of \$4,000 during her life, and pecuniary legacies to other relatives. The ninth clause authorized and empowered the executors to sell the real property for the benefit of the legatees, and to apply the rents thereof, until sold, to the satisfaction of the annual claims of the wife and daughter. The personal property being absorbed in the payment of debts and expenses of administration, and the real property yielding only \$6,500, the daughter contended that the income of the latter sum should be divided between her and the widow in proportion to their legacies.—*Held*, that the will charged the legacies upon the real property; and that, of the proceeds of the sale thereof, \$3,000 should be invested for the widow, and the balance for the daughter. *Brink v. Masterson*, 524.

See ABATEMENT OF LEGACY; ANNUITY; INTEREST, 4, 5, 6; SUCCESSION TAX.

## LIEN.

See ATTORNEYS AND COUNSELLORS, 2, 3, 4, 5, 6, 7, 8; DISCOVERY OF ASSETS, 6; JUDGMENT CREDITOR.

## LETTERS OF ADMINISTRATION.

1. A non-resident alien, not being entitled under our statute (2 R. S., 75, § 32), to a grant, by a Surrogate's court of this State, of letters of administration upon an intestate's estate, cannot, by a power of attorney, authorize another to procure what he is himself debarred from receiving. *Sutton v. Public Administrator*, 33.
2. Joint letters should not issue to different persons, where there is reason to doubt that their counsels would be harmonious, or that their united action would conduce to the best interests of the estate. *Quintard v. Morgan*, 168.
3. 2 R. S., 76, § 34, permitting "administration" to be granted, upon the consent of a person entitled, jointly to him and another not entitled, applies to a case of administration with a will annexed. *Id.*
4. Under 2 R. S., 74, § 28, declaring that, among kindred of an intestate of the same degree, males shall be preferred to females, in the grant of letters of administration upon the estate, a son who resides in another state has, in spite of that fact, a priority of right over a daughter resident here. *Lussen v. Timmerman*, 250.
5. Two persons, each asserting herself to be the widow of an intestate, and one of whom is a petitioner for the revocation of letters of administration already granted to the other, occupy the same position before the court, as regards proof of their respective claims to such *status*, as if they had simultaneously applied for appointment. *Stanley v. Stanley*, 416.

See ADMINISTRATOR WITH WILL ANNEXED; ANCILLARY LETTERS, 2;  
REVOCATION OF LETTERS.

## LETTERS TESTAMENTARY.

1. The pendency of a special proceeding for the revocation of probate of a will, is not a bar to the grant of letters testamentary; but an executor appointed while such a controversy is in progress has only such limited powers as are possessed, under Code Civ. Pro., § 2582, where an appeal has been taken from a decree admitting a will or granting letters. *Bible Society v. Oakley*, 450.
2. Where letters testamentary have been issued to one not a resident of the State, they cannot be revoked because of his continued non-residence, nor can an official bond be required of him upon that ground. *Postley v. Cheyne*, 492.

See REVOCATION OF LETTERS.

## LIFE TENANT.

1. Where a residuary estate, consisting of both productive and unproductive property, was devised and bequeathed to trustees, to apply the income



o the use, support and maintenance of specified persons for life, with remainders over, and the entire income was absorbed, and a deficit occurred, during each of several years in carrying the property, until by a rise in values, and sales, a surplus appeared, the Surrogate considered that the respective claims, to such and subsequently accruing surplus, of the life beneficiaries and the remaindermen, should, in the absence of directions in the will to keep the property *in specie* as it stood at the testator's death, be adjusted by ascertaining what amount of income the property would have produced during the period elapsed since such death, if, at the end of a year from that event, the entire residue had been sold, and the proceeds invested in authorized securities. *Matter of Kendall*, 133.

2. Under ordinary circumstances, executors are not justified in turning over to one who has a simple life estate therein, property given in remainder to another, without exacting from the first taker security for the latter's protection. *Contra*, where the will indicates a design on the part of a testator, to entrust full possession and control to the life beneficiary, unless special circumstances render such an unconditional surrender manifestly hazardous. *Fernbacher v. Fernbacher*, 227.
3. Testator, by his will, whereof his wife and two other persons were nominated and appointed executors, gave to the former all his real and personal estate, "for her life, she to have the same power of sale and control over said property as I could have in my own proper person, during her said life estate;" gave to his children, in equal shares, in fee, all the rest, residue, etc., of his property "which shall remain after the life estate" mentioned; directed that his sons should carry on his business so long as the wife thought best; authorized the latter to pay, during her lifetime, to any of the children, all or any part of the shares to which they "may be entitled" under the previous provision in their favor; and bestowed upon his executors "full power to sell" any or all of the real or personal property, as to them should seem meet in order to carry out the terms of his will.—*Held*, that the first clause of the will, whether considered alone or in the light of the remaining provisions, conveyed a simple life estate to the widow; who, accordingly, had no right or power, by consuming either a part or the whole of the principal, to impair or defeat the possibility of remainder to the children. *Id.*
4. It was contended that the testator's widow obtained an absolute fee or interest, subject only to the taking effect of the remainder, in default of the exercise of the power of sale in her lifetime,—under the provisions of 1 R. S., 732, §§ 81, 85, providing for such a result "where an absolute power of disposition, *not accompanied by any trust*, shall be given to the owner of a particular estate," etc.—*Held*, that, by reason of the limitation contained in the italicized clause, the statute cited had no application to the case at bar. *Id.*
5. Upon a petition presented, under Code Civ. Pro., § 2685, subd. 2, by one of the remaindermen named in the same will, for the removal of the

executrix and executors, upon the ground of their misconduct in having wasted, misappropriated and improvidently managed the estate, it appearing that respondents had intentionally omitted from their account items of assets with which they should have charged themselves; falsely stated the sum for which testator's business was sold, and neglected to realize the same; and, especially, that the executors, other than the widow, had surrendered to the latter, without security, possession of all the property, knowing her to entertain a design, which she in fact effectuated, to waste the fund at the expense of the remaindermen;—*Held*, that the application should be granted, an immediate revocation of the letters being proper under the circumstances, in advance of the entry of a decree upon an accounting then in progress. *Id.*

6. The will, which directed a conversion of the entire property, provided that, until this was effected, the executors should "receive the rents, interest and income thereof," and pay and apply them, as required with respect to interest and income of proceeds of sale. The executors retained, for several years, household furniture belonging to the estate, and let the same with the house in which it was contained, this course being obviously for the advantage of the life beneficiaries.—*Held*, 1. That the executors were justified in retaining annually a portion of the income, to meet a prospective loss, by depreciation, upon the sale of the furniture. 2. That, upon such sale, a sum equal to the depreciation should be transferred from income to capital account, provided that the life beneficiaries would thus receive as much income as if the furniture had been promptly converted, and the house let vacant. *Matter of Housman*, 404.
7. Where a will limits a gift of general residue in successive estates, the first taker, unless an intent appears that he should enjoy the subject *in specie*, is not entitled to the annual proceeds of such property as may be held by the executors; but the property is to be treated as if converted and capitalized, so as to allow such taker the annual income that would be yielded by such capital, and to preserve the latter to meet subsequent claims under the settlement. *Id.*

#### LIMITED LETTERS.

See LETTERS TESTAMENTARY, 1.

#### LIMITATION.

See STATUTE OF LIMITATIONS.

#### LOST WILL.

1. The *factum* of a lost or destroyed will must be established in the same manner as if the will itself were produced in court, for probate; *i. e.*, two, at least, of the subscribing witnesses, must be produced, or the

non-production of one or both be satisfactorily accounted for, whereupon the fact that he or they attested the will must be proved by competent testimony. *Collyer v. Collyer*, 53.

2. Under Code Civ. Pro., § 1835, requiring that the provisions of a lost or destroyed will must be "clearly and distinctly proved by at least two credible witnesses, a correct copy or draft being equivalent to one witness," one who produces and merely verifies an alleged draft of the will cannot be considered the needed additional witness, within the design of the rule; nor are declarations of the decedent, as to the contents and substance of the will, available as an equivalent thereto. *Id.*
3. Upon an application for the probate of a will alleged to have been lost or destroyed, the only witness examined as to the *factum* was the lawyer who drew it, and who produced a draft containing neither the decedent's name, nor the names of the subscribing witnesses. He thought, though he was unable positively to swear, that he was a subscribing witness, but was unable to state who, besides himself, acted as such; thus rendering it impossible either to call the other witness, or, by accounting for his absence, to lay a foundation for proof of the fact that he signed in attestation.—*Held*, that, on this ground, alone, probate should be refused. *Id.*
4. The history of the bestowal, and mode of exercise, of the power to take proof of lost wills of real and personal property—narrated. *Id.*

#### LUNATIC.

While the conduct of the committee of the person of a lunatic, in fixing the residence of the latter, is subject to judicial control, the act of the committee will, until such control is invoked or exercised, be deemed to be the act of the court, performed through its duly constituted agent. *Hill v. Horton*, 88.

#### MAINTENANCE.

See INFANT, 2 ; JURISDICTION, 8.

#### MARRIAGE.

1. One asserting herself to be the widow of a decedent, and her title as such to intervene in proceedings instituted to procure probate of a paper propounded as his will, may show, in the Surrogate's court, that a prior marriage did not disqualify her to become decedent's wife, by reason of the same having been void *ab initio*. *Matter of Bethune*, 392.
2. Where a relation nominally matrimonial is shown to have been in fact meretricious in its origin, it will be presumed to have continued such, in the absence of evidence that, somehow, somewhere and at some time, its character was changed. *Stanley v. Stanley*, 416.

See NEXT OF KIN ; REVOCATION OF LETTERS, 9.

## MARSHALING OF ASSETS.

1. Decedent died intestate and insolvent, domiciled in New Jersey, and leaving personal property in that state and also in the county of New York. No administration was granted in New Jersey, but the widow, soon after the death, collected the assets there, brought them into New York county, and procured here letters of administration of the estate. Two creditors, of whom one had recovered a judgment in this State against decedent in his lifetime, and the other was decedent's medical attendant in his last illness, who had recovered a judgment here for the amount of his bill, against the administratrix, filed petitions for the payment of their respective claims. By the New Jersey statute, "the physician's bill during the last sickness" is accorded priority over the claims of ordinary creditors.—*Held*, that the entire amount of the New Jersey assets, less their ratable contribution to the expenses of administration, should be applied to the discharge of the physician's claim, in preference to that of the judgment creditor of decedent. *Hardenberg v. Manning*, 437.
2. Upon the judicial settlement of the account of the administrator of the estate of decedent, who during his lifetime was engaged in business in partnership with another, one L. sought to procure payment, out of the assets of that estate, of a demand representing moneys paid by her as follows: (1) the amount of a note signed by each partner, and by her as accommodation maker, for money borrowed by the firm and used in their business; (2) five other notes executed to her by the partners, in their individual names, after dissolution of the firm, and endorsed by her for their accommodation, the same being in renewal of firm notes previously made to, and in like manner endorsed by her; all of which notes she was compelled to pay. A judgment of the Supreme court, entered upon the report of a referee appointed under the statute, had determined the right of L. to share, ratably with the individual creditors of decedent, in the assets of the estate, which were insufficient to pay both classes of claims in full.—*Held*, that this determination was not binding upon the individual creditors or the Surrogate's court; that the instruments held by L. were not enforceable against decedent's estate on the theory that they were joint and several liabilities of the makers, but retained their original character as evidences of partnership obligation; and that the decree should provide for the payment of the individual creditors in full, and the distribution of the balance of the assets among L. and the other firm creditors. *Lockwood v. Carr*, 515.

## MAXIMS.

The maxim, "*expressio unius exclusio est alterius*," when appealed to in support of the theory of an implied abrogation of a statute, is to be considered in connection with the principle—that repeals by implication are not favored. *Wardlow v. Home for Incurables*, 473.

## MENTAL CAPACITY.

See INSANE DELUSION.

## NEW TRIAL.

See REHEARING.

## NEXT OF KIN.

One who asserts his relationship, as one of the next of kin of a decedent, and his title, as such, to contest the admission to probate of an alleged will of the latter, cannot, for the purpose of establishing his *status*, impeach, in the Surrogate's court, a marriage between decedent and another on the ground of force or fraud in its procurement; or the validity of a judgment dissolving a prior marriage between such other person and a former consort, upon allegations that the same was obtained by collusion, and for the purpose of entering into the second marriage. *Henry v. Henry*, 353.

## NON-RESIDENT EXECUTOR.

See OFFICIAL BOND, 2.

## NOTICE.

See DISPUTED CLAIM, 1; OFFICIAL BOND, 1.

## OBJECTION.

1. Under Code Civ. Pro., § 2533, permitting the Surrogate "to require a party to file a written petition or answer containing a plain and concise statement of the facts constituting his claim, objection or defence," etc., and Rule 9, which declares that a party desiring to test an account "shall file specific objections thereto in writing," and that "the contest of such account shall be confined to the items or matters so objected to," a statement, in a paper purporting to set forth objections to an account of trustees for infant *cestuis que trustent*, that their guardian "asks an explanation of" an investment, "with liberty to approve the same if it shall be to the interests of the minors," cannot be regarded as an "objection" to such investment. *Robert v. Morgan*, 148.
2. Accordingly where, in proceedings for the judicial settlement of the account of such trustees, one of the accounting parties, on his examination before a referee, to whom the matter had been referred with full power, refused to answer questions addressed to him, in behalf of the infants, for the purpose of showing the impropriety of an investment which had not been assailed except in the manner described,—*Held*, that he could not be punished for contempt, on account of such refusal, though he persisted therein after being instructed to answer by the referee. *Id.*

8. An objection, filed upon an accounting by trustees, to the effect that "the trustees have not accounted for interest on the moneys in their hands," is too indefinite and uncertain to be regarded, and must be amended before it can be pressed. *Frame v. Willets*, 368.

See ACCOUNTING, 2.

#### OFFICIAL BOND.

1. Where the decree of a Surrogate's court, removing a sole testamentary trustee, designates another in his place, the exaction of a bond from the successor, though not required by statute, is in the discretion of the court; which may also determine to whom notice of the proposed appointment shall be given. *Lane v. Lewis*, 468.
2. The will of testator nominated as two of its executors two residents of another state, expressly providing that they might act as such without giving security. The nominees were respectively the treasurer and the cashier of a foreign manufacturing corporation having its principal office in the city of New York, and attended daily thereat, in such capacities, during business hours.—*Held*, that they had "an office within the State, for the regular transaction of business in person," within the meaning of Code Civ. Pro., § 2638, and were entitled to letters without giving bonds. *Postley v. Cheyne*, 492.

See GENERAL GUARDIAN, 2.

#### ORDER.

See APPEAL, 6; JURISDICTION, 3, 4; REHEARING.

#### PARTIES.

1. A contest respecting the *status* of a party to a special proceeding, instituted to procure the probate or revocation of probate of a will, should generally be tried, at the outset, before the taking of testimony, by commission or otherwise, touching the genuineness and validity of the disputed instrument. *Henry v. Henry*, 253.
2. One asserting the right, under Code Civ. Pro., § 2614, as a creditor of a decedent, to present the latter's will for probate, must, where his character as such is disputed, set forth facts showing, *prima facie*, that his claim is well founded. *Gove v. Harris*, 293.
3. The attorneys for one who had recovered a judgment in the Supreme court, against the administrator of decedent's estate, for damages and costs,—*Held*, though not creditors of the decedent, to have such an interest in the estate, by virtue of their statutory lien, as to entitle them to institute a special proceeding under Code Civ. Pro., § 2726, to compel a judicial settlement of the administrator's account. *Close v. Shute*, 546.

See ACCOUNTING, 5; DEPOSITION, 3.

## PARTNERSHIP.

1. The surviving partners of a decedent, having a right to settle up the business of the firm, cannot be required to turn over the decedent's interest therein to his personal representative, until after payment of the partnership debts, and an accounting whereby the amount of such interest is determined. *Camp v. Fraser*, 212.
2. The surviving partner of a decedent, who is also an executor of his will, is entitled to no remuneration, in the latter capacity, for his labors in winding up the business of the firm, the performance thereof being obligatory upon him as a duty incidental to the contract of partnership. *Matter of Harris*, 463.

See APPRAISAL, 2; EXECUTORS AND ADMINISTRATORS, 1; MARSHALING OF ASSETS, 2; REVOCATION OF LETTERS, 4.

## PAYMENT OF DEBTS.

1. Where the claim of a creditor of the estate of a decedent is evidenced by a judgment recovered against the latter in his lifetime, an answer filed pursuant to Code Civ. Pro., § 2718, subd. 1, to a petition to compel payment, must, in order to oust the Surrogate of jurisdiction, set forth facts constituting a defence to or avoidance of the judgment. *Salomon v. Heichel*, 176.
2. A Surrogate's court, to which a petition, for a decree directing payment of a debt by an executor or administrator, is presented under Code Civ. Pro., § 2717, is ousted of jurisdiction by the filing of an answer setting up a claim, not palpably unfounded, of an equitable set-off to the petitioner's demand. *Hall v. Dusenbury*, 181.
3. Where a legatee is indebted to the estate of his testator, in a sum less than the amount of the bequest, the executor is bound to apply such portion of the latter as is needed to the satisfaction of the debt. It being permissible that this should be done at once, the testator must be presumed to have designed that the application should be made, as of the date of his death, so far as necessary to the debt's extinguishment, and the balance be treated as the real, substantial legacy, payable at the expiration of one year thereafter. *Dickerson v. Stokes*, 219.
4. The right of a creditor of a decedent, to priority in payment of his claim out of the assets of the estate, is unimpaired by the recovery of a judgment against the personal representative. *Hardenberg v. Manning*, 437.

## • PAYMENT OF LEGACY.

1. One who has been removed from office as testamentary trustee cannot be brought into court by the *cestui que trust*, under Code Civ. Pro., § 2804, upon a petition to compel him, either alone or in conjunction

with his successor, to pay to the petitioner income of the trust, received by him before his removal. *Moorhouse v. Hutchinson*, 362.

2. An answer to a petition presented under Code Civ. Pro., § 2804, praying for a decree directing the payment of money by a testamentary trustee, wherein respondent asserts—that he is not possessed of knowledge or information sufficient to form a belief as to whether petitioner's claim is valid and legal or not—does not oblige the court to dismiss the petition, under id., § 2805. *Id.*

See INTEREST, 1 ; PAYMENT OF DEBTS, 3.

#### PERSON INTERESTED.

1. Under Code Civ. Pro., § 2514, subd. 11, providing that, where “a person interested” is permitted by ch. 18 to “apply for an inventory,” etc., “an allegation of his interest, duly verified, suffices, although his interest is disputed,” one of the next of kin of an intestate may obtain such relief, in spite of an averment that he has executed an assignment of his share, which he assails as void for fraud in its procurement. *Schmidt v. Heusner*, 275.
2. A mere appearance of interest in the estate of a decedent is ordinarily sufficient to sustain an application, under Code Civ. Pro., § 2726, to compel a judicial settlement of the account of its representative ; as where the interest of petitioner appears to have been extinguished by a release which he attacks as void. *Reilley v. Duffy*, 366.

#### PETITION.

See INFANT, 1.

#### POWER OF APPOINTMENT.

See CONSTRUCTION OF WILL, 5.

#### PRACTICE.

See PARTIES, 1.

#### PRESUMPTION.

- A declaration, made by a decedent, seven months before his death, to the effect that he had made a will of a certain character, does not rebut the presumption of its destruction, *animo retocandi*, arising from the fact that none could be found, after diligent search made soon after the death. *Collyer v. Collyer*, 53.



## PROBATE OF WILL.

1. An alleged will, subscribed by decedent, by making a cross mark, and one of the two subscribing witnesses whereto is dead, cannot be admitted to probate upon the testimony of the living witness, and proof of the handwriting of the other,—there being no possibility of “proof of the handwriting of the testator,” which is made essential by Code Civ. Pro., § 2620, where “a subscribing witness whose testimony is required is dead.” *Matter of Reynolds*, 68.
2. As to whether the difficulty would be obviated, were another witness able to testify that he saw the decedent make his mark—*quære*. *Id.*
3. A will admitted to probate upon the testimony of one of three subscribing witnesses, and against that of the others swearing positively that there was no publication. *Egan v. Pease*, 301.
4. Five thousand dollars and disbursements are too much to charge for procuring the admission of an uncontested will to probate. *De Lamater v. McCaskie*, 549.

See JURISDICTION, 6; LOST WILL; REVOCATION OF PROBATE.

## PUBLIC ADMINISTRATOR.

1. The provisions of R. S., part 2, ch. 6, tit. 6, art. 2, entitled: “Of public administrators in the several counties of this State, other than the county of New York,” were not repealed or otherwise affected by L. 1842, ch. 155, entitled: “An act in relation to coroners,” and partly embodied in Code Crim. Pro., §§ 785–787. *Sutton v. Public Administrator*, 83.
2. Accordingly, where a man dies, from whatever cause, in this State, elsewhere than in New York or King’s county, leaving assets amounting to \$100 or more, in the county where the death occurs, and there is “no widow or relative in the county, entitled or competent to take letters of administration on the estate,” the county treasurer should proceed, as public administrator, to procure letters of administration, under the article of the Revised Statutes, above cited. *Id.*

See DISCOVERY OF ASSETS, 1.

## PUBLICATION OF WILL.

1. It must be deemed a settled doctrine in this State, that—where a testator produces a paper to which he has already personally subscribed his name, and *exhibits the same so subscribed* to another, with a request that the latter sign it as a witness, at the same time declaring it to be his last will and testament,—he virtually acknowledges his signature, and effects a due publication, as to such witness, within the meaning of the statute of wills (2 R. S., 63, § 40). *Porteus v. Holm*, 14.
2. Upon an application for the probate of a paper propounded as the will of decedent, it appeared that there were several blank spaces in the body of the instrument, large enough to permit the insertion of disposing

clauses without interlineation, and, at the end, for the signature of decedent, and the date of execution. Decedent's name, with the suffix, "Adm'x," was subscribed only once, viz.: at the end of an attestation clause, which recited that the testatrix subscribed in the presence of each witness, and in such presence declared the instrument to be her last will. The only credited testimony, relative to publication, was that of the two subscribing witnesses, of whom the first testified that decedent came to his store, and presented to him the paper, so folded that he could see no part of the writing except the last line of the attestation clause, to wit, "our names hereto as witnesses this                      day of                      1882," which he did not read, and asked him to "witness her signature," which she wrote in his presence, and then departed, expressing the intention of visiting the other witness for a like purpose. The second witness recognized his signature as genuine, but recollected nothing.—*Held*, that probate must be refused, for want of proof of an acknowledgment, by decedent, to the first witness, of the testamentary character of the instrument. *Id.*

3. There is no such rule, in this State, as that words or acts which satisfy the statutory requirements in regard to publication of an instrument as a will, and request to witnesses to attest the same, necessarily include a compliance with those relating to the testator's signature, and his acknowledgment thereof. *Buckhout v. Fisher*, 277.
4. Upon an application for the probate of an instrument purporting to be the will of decedent, it appeared that the same was written upon one side of a piece of paper, eight by ten inches in size, decedent's signature being in its proper place, at the end. Decedent did not subscribe his name in the presence of either witness, and did not expressly acknowledge his signature to either, nor was it shown that either of them saw such signature at the time of the attestation, though the entire paper was necessarily exposed to their view, and declared by decedent to be his will.—*Held*, 1. That the court was authorized to infer, from internal evidence, which the paper afforded, that it bore decedent's signature when presented to the witnesses. 2. That the exposure to them of the entire contents of the paper, accompanied with a declaration of its testamentary character, and request to sign, constituted a sufficient acknowledgment by decedent of his signature within the requirement of the statute of wills (2 R. S., 63, § 40). *Id.*

See ATTESTATION CLAUSE.

#### PUNISHMENT FOR CONTEMPT.

See CONTEMPT.

#### REAL PROPERTY.

See SALE OF REAL ESTATE.'

## REFERENCE.

1. A Surrogate's court is without power to direct a referee, to whom a proceeding has by it been submitted, to file his report in advance of receiving his fees; or to require any party to pay those fees in advance of such filing. But a party making such payment may, in a proper case, be subsequently reimbursed, out of the estate or fund, or by an adjudication fixing a personal liability for the amount upon a party from whom the same may be justly demanded. *Matter of Kraus*, 217.
2. 2 R. S., 88, 89, §§ 36, 37, relating to a reference of a disputed claim against a decedent's estate, making no provision for the adjudication of any other matter than *the justice of the claim*, the referee has not power to pass upon any questions except such as are incidental and necessary to the determination of the main inquiry. *Lockwood v. Carr*, 515.

## REHEARING.

1. Power to grant a new trial or new hearing, for newly discovered evidence, which means a re-trial of the issues made by the pleadings, is the only really new power conferred upon Surrogates' courts, by Code Civ. Pro., § 2481, subd. 6, whereby a Surrogate is permitted, in court or out of court, "to open, vacate, modify or set aside, or to enter as of a former time, a decree or order of his court; or to grant a new hearing for fraud, newly discovered evidence, clerical error or other sufficient cause." *Olmsted v. Long*, 44.
2. Upon the principle that punctuation may be disregarded, where necessary, in construing statutes, the semicolon appearing in the subdivision quoted is to be deemed replaced by a comma; so as to confine the exercise of the powers specified in the former of the two clauses, to cases presenting one or more of the grounds mentioned in the latter. *Id.*
3. Where the granting, by a Surrogate's court, of an application to open, vacate and set aside a decree thereof, would necessarily lead to a new trial or hearing,—as where the applicant relies chiefly upon allegations of fraud or newly discovered evidence,—the case is to be governed by the principles established respecting the grant of new trials, though a prayer for such relief is not contained in the petition. *Id.*
4. The reasonable rule established by the superior courts, on a motion for a new trial, prevails, also, in Surrogates' courts, viz.: that alleged newly discovered evidence must be so clear and positive as to satisfy the mind of the court that, if offered pending the trial, it would have changed the result. *Id.*

## REMAINDERMAN.

See LEGACY, 4 ; LIFE TENANT.

## REPEAL.

See CHARITABLE BEQUESTS, 2, 3 ; MAXIMS.

## RESIDENCE.

See JURISDICTION, 6 ; LUNATIC.

## RESIDUARY LEGACY.

See LIFE TENANT, 1, 7.

## RESIGNATION OF TRUST.

See REVOCATION OF LETTERS, 7.

## REVISED STATUTES.

[Sections construed or cited.]

- 1 R. S., 732, §§ 81, 85.....*Fernbacher v. Fernbacher*, 227.
- 2 R. S., 63, § 40.....*Porteus v. Holm*, 14.
- 2 R. S., 63, § 40.....*Matter of Case*, 124.
- 2 R. S., 63, § 40.....*Buckhout v. Fisher*, 277.
- 2 R. S., 74, § 28.....*Lussen v. Timmerman*, 250.
- 2 R. S., 75, § 32.....*Sutton v. Public Administrator*, 33.
- 2 R. S., 75, § 33.....*Blanck v. Morrison*, 297.
- 2 R. S., 76, § 34.....*Quintard v. Morgan*, 168.
- 2 R. S., 82, § 2.....*Vogel v. Arbogast*, 399.
- 2 R. S., 82, § 3.....*Salomon v. Heichel*, 176.
- 2 R. S., 84, § 13.....*Rugg v. Jenks*, 105.
- 2 R. S., 88, §§ 36, 37.....*Lockwood v. Carr*, 515.
- 2 R. S., 93, § 58.....*Hardenberg v. Manning*, 437.
- 2 R. S., 93, § 58.....*Pullman v. Willets*, 536.
- 2 R. S., 96, §§ 75-78.....*Kintz v. Friday*, 540.
- 2 R. S., 120, § 8.....*Public Administrator v. Elias*, 139.
- 2 R. S., 129, §§ 47-76.....*Sutton v. Public Administrator*, 33.

## REVOCATION OF LETTERS.

1. An executor, whose letters have been revoked in consequence of his having been adjudicated a lunatic, though afterwards judicially restored to sanity and the possession of his property, can never be rehabilitated in office. *Matter of Dearing*, 81.
2. Of the two persons, A. and B., nominated executors of a will, the former alone qualified and entered upon the discharge of his official duties. Having been judicially declared to be incompetent to manage his affairs, A. was removed from office, and letters were issued to B., who died. Thereafter A., who had been adjudged to be again sane, asked that letters testamentary be reissued to him.—*Held*, that there was no

rule of the common law, for provision of statute, authorizing the court to grant the prayer of petitioner, and that an administrator, with the will annexed, must be appointed. *Id.*

8. Code Civ. Pro., § 2839, permitting a Surrogate to issue ancillary letters of general guardianship of the property of an infant residing in another state, in case he is satisfied "that it will be for the ward's interest" so to do, impliedly authorizes that officer to revoke such letters, where it appears that the like result will be accomplished by a revocation, and thus render secure the property of the ward yet remaining within his jurisdiction, irrespectively of the action of the court by which the guardian's powers were originally conferred. *Johnson v. Johnson*, 93.
4. A Surrogate's court will not revoke an executor's letters at his own request, under Code Civ. Pro., §§ 2689, 2690, upon allegations that he has interests, as surviving partner of the decedent, antagonistic to his duties as executor, necessitating resort to another tribunal, where the estate should be represented by a disinterested person,—the former court having ample power to adjust the equities of the case. *Becker v. Lawton*, 341.
5. The fact that an executor and testamentary trustee is "too busy with his own matters" to continue in the service is not a "sufficient reason" for the exercise, by a Surrogate, of the discretion conferred upon him by Code Civ. Pro., §§ 2690, 2814, to permit the former to resign, especially where the beneficiaries of the trust are opposed to such a course. *Baier v. Baier*, 162.
6. Upon the return of a citation, issued in compliance with the prayer of a petition by an alleged assignee of a legatee under decedent's will,—directing the executor to show cause why he should not be removed, or compelled to give security, or required to pay to his successors or into the registry of the court all moneys and property by him received,—respondent interposed affidavits denying the existence of such a person as the legatee named in the will, and asked for a dismissal of the proceedings pursuant to Code Civ. Pro., § 2718, upon the theory that the same were instituted to enforce payment of a legacy.—*Held*, that the petition substantially invoked the exercise of the power of the court to remove the executor from office, as permitted by Code Civ. Pro., § 2685; that it was not competent for respondent, by a total or partial denial of the moving allegations to entrench himself in office and oust the court of jurisdiction; and that the dismissal asked for should be refused. *Slez v. Forst*, 346.
7. One who had, for sixteen years, been actively engaged in performing his duties as one of the trustees of a testamentary trust, the administration of which was nearly completed, having applied to the court for his discharge, it was shown that he intended to reside without the United States, that further attention to his duties would for that reason be inconvenient if not impracticable, and that his retirement would not be likely to embarrass the management, the chief burden

of which had hitherto rested upon him.—*Held*, that “sufficient reasons” were presented, within Code Civ. Pro., §§ 2690, 2814, “for granting the prayer of the petition.” *Tilden v. Fiske*, 357.

8. In order to justify a revocation of letters of administration, or of general guardianship, upon the ground that the same were “obtained by a false suggestion of a material fact” (Code Civ. Pro., § 2685, subd. 4; *id.*, § 2832, subd. 4), it must be made to appear that the suggestion was made to the tribunal by which the letters were granted. *Corn v. Corn*, 394.
9. For several years preceding the year 1857, decedent and A. cohabited in the city of New York, as if husband and wife. When the cohabitation began, the woman, A., was incapable of contracting marriage, she having a husband then living; and after it ceased, decedent was formally married to B. The separation between decedent and A. was not attended with the circumstances naturally occurring in case of the severance of marital relations,—the latter having never attempted a vindication of her conjugal rights, until she procured letters of administration of his estate.—*Held*, that A.’s relations with decedent, being illicit at the outset, must be presumed to have continued to possess that character until the marriage of the latter; and that her letters of administration should be revoked. *Stanley v. Stanley*, 416.
10. The fact that executors are “men of inconsiderable means, not transacting business or having any place of business,” does not show that their “circumstances are such that they do not afford adequate security for the due administration of the estate,” within the meaning of Code Civ. Pro., § 2685, prescribing the grounds for revocation of letters testamentary. *Postley v. Cheyne*, 492.

See GENERAL GUARDIAN, 4; LIFE TENANT, 5; TESTAMENTARY GUARDIAN.

#### REVOICATION OF PROBATE.

Upon an application, made under Code Civ. Pro., § 2647, to revoke the probate of a will, on the ground of the existence of a later will which was propounded accordingly, it appearing that the latter instrument was a codicil to the former,—*Held*, that the petition for revocation should be denied, and the codicil being duly proved, be admitted as such. *Canfield v. Crandall*, 111.

#### REVOCATION OF WILL.

1. A disposition made by a will is revoked by a subsequently executed testamentary instrument, making a provision inconsistent therewith, although the latter proves ineffectual in consequence of the inability of the designated beneficiary to take thereunder. *Canfield v. Crandall*, 111.
2. As to whether the nomination, by a will, of a designated person as executor thereof, is revoked by a codicil which names a different person to

act in such capacity, but omits expressly to recall the prior appointment—*quære*. *Stölzel v. Cruikshank*, 352.

SALE OF REAL ESTATE.

1. An application, made upon various grounds, to open and vacate a decree directing the sale of certain of decedent's real property for the payment of his debts—denied upon the merits. *Olmsted v. Long*, 44.
2. Decedent died October 1st, 1868, indebted to C., on simple contract, in the sum of \$300, which had become due and payable April 1st, 1868, and leaving a will nominating executors, to whom letters were issued on October 19th of the same year. In June, 1871, a judgment for the amount of the claim was recovered against the executors, who, in July, 1880, voluntarily rendered their first account, showing an insufficiency of assets to pay alleged debts. On May 17th, 1886, C. instituted a special proceeding for the disposition of the real property of decedent, for the payment of his debts. Upon objection by the devisees,—*Held*, that C.'s claim was barred by the statute of limitations, his remedy against the real property gone, and that the application should be denied. *Carman v. Brown*, 96.
3. In a special proceeding, instituted under Code Civ. Pro., ch. 18, tit. 5, by a creditor, to procure a decree directing the disposition of a decedent's real property for payment of the debt, where it appears that the property has been already sold, pursuant to a judgment of the Supreme court, foreclosing a mortgage thereon, made by decedent in his lifetime, the invalidity whereof is asserted by the petitioner, though the Surrogate's court is concluded by the judgment in question, the proceedings should not be dismissed, but be kept alive until a reasonable opportunity has been afforded petitioner for attacking, in a competent tribunal, the foreclosure and sale of which he complains. *Knickerbocker v. Decker*, 128.

See STATUTE OF LIMITATIONS.

SAVINGS BANK.

See BANK DEPOSIT.

SET-OFF.

See COUNTERCLAIM; PAYMENT OF DEBTS, 2.

SPECIAL GUARDIAN.

See GUARDIAN AD LITEM.

STATUTE OF LIMITATIONS.

*It seems*, that the limitation, contained in Code Civ. Pro., § 2750, of the

time within which a creditor may present a petition for the disposition of a decedent's real property for the payment of his debt, to three years after letters are granted,—and the suspension, by *id.*, § 1844, of the right of action therefor against the heirs and devisees during the same three years,—have no such connection as to justify a construction whereby the period of such suspension should be deemed to enlarge that of the limitation mentioned. *Carman v. Brown*, 96. •

See SALE OF REAL ESTATE, 2.

#### STAY OF PROCEEDINGS.

Under Code Civ. Pro., §§ 1310, 2584, relating to a stay upon appeal, the perfecting of an appeal from an order of a Surrogate's court, denying an application for the issuing of a commission to take testimony to be used in a special proceeding pending therein, does not operate as a suspension of the hearing. *Henry v. Henry*, 253.

See APPEAL, 5.

#### SUBSCRIBING WITNESS.

*It seems*, that it is not essential to show that a request, made by a decedent, to a subscribing witness to an alleged will of the latter was, in terms, to sign *as a witness*, where the circumstances warranted such an interpretation of the request. *Porteus v. Holm*, 14.

See EXECUTION OF WILL, 2, 3, 4 ; PROBATE OF WILL, 1, 3.

#### SUCCESSION TAX.

Legacies bequeathed to infants, "*to be paid* to them as they shall severally attain the age of twenty-one years," with gifts over in the event of earlier demise, vesting on testator's death, are not within the purview of an act taxing legacies, prospective in its character, passed after such death, though before the legacies become payable. *Matter of Cogswell*, 248.

#### SUGGESTIO FALSI.

See REVOCATION OF LETTERS, 8.

#### SURROGATE'S COURT.

See JURISDICTION.

#### TAX.

See SUCCESSION TAX.

#### TEMPORARY ADMINISTRATOR.

1. Though one nominated executor of an alleged will, who is charged by a



contestant with the exercise of undue influence, should generally not be appointed, against the latter's objection, temporary administrator pending the controversy over probate, yet where the allegations of such influence are vague and uncertain, *e. g.*, that the same was exerted by "sundry and divers persons unknown," and the objector's share of the estate, in case probate were refused, would be small; considerations of economy may justify the issue of temporary letters to such nominee, especially where the other parties in interest accede. *Haas v. Childs*, 137.

2. A temporary administrator of a decedent's estate has not an absolute right to demand the judicial settlement of his account. As to whether he is an "administrator," within the purview of Code Civ. Pro., § 2689, relating to an application for discharge from office—*quære*. *Bible Society v. Oakley*, 450.

#### TEMPORARY GUARDIAN.

See COMMISSIONS, 4.

#### TESTAMENTARY CAPACITY.

See INSANE DELUSION.

#### TESTAMENTARY GUARDIAN.

While a general guardian whose authority is derived exclusively from judicial appointment may be deprived of his office by a Surrogate's court, whenever "the infant's welfare will be promoted by the appointment of another guardian" (Code Civ. Pro., § 2832, subd. 6), the power of the court is subject to a narrower limitation as regards a testamentary guardian, who cannot be removed except upon grounds which would justify it in displacing a testamentary trustee (*id.*, §§ 2817, 2858). *Mackay v. Fullerton*, 153.

#### TESTAMENTARY TRUSTEE.

1. The description, by a will, as "trustees," of persons thereby nominated to execute its provisions, does not constitute them such, unless trusts are created for them to perform; while, on the other hand, where the instrument creates such trusts, its failure so to describe such nominees will not deprive them of that character. *Bacon v. Bacon*, 5.
2. A provision, in a will, for *qualification* by persons therein designated "executors and trustees," negatives the inference of an intention to constitute a trust, in the technical sense of that word. *Id.*
3. Testator, by his will, gave all his property to the executors, in trust to apply the income to the use of his infant daughter for life; empowering them, in their discretion, to apply, if necessary for her support, *such part of the principal*, not exceeding \$500 per annum, *as they might think necessary*; with remainder of the unexpended principal over.—

*Held*, that the court had not power to direct the trustees to use any portion of the principal for the purpose indicated, in the absence of proof that they had abused their discretion, and that their conduct had been inconsistent with an honest and faithful discharge of their duties. *Banning v. Gunn*, 337.

4. A provision in a will, for the exigency of a resignation on the part of those therein nominated executors and trustees, though not to be construed as indicating an intent that a nominee having qualified as executor may abandon his trust at pleasure, is entitled to weight in determining whether a cause assigned by an executor for his proposed resignation should be deemed sufficient to justify it. *Tilden v. Fiske*, 357.
5. The office and authority of one designated a trustee by a will being derived wholly from that instrument, without intervention by any court, the *status* of such a person, where disqualified by statute to act in the capacity indicated, is substantially the same as that of an executor who, though for like reasons incompetent, has in fact received letters in the absence of opposition. *Lane v. Lewis*, 468.
6. Hence where it appeared that the person appointed by a will, to execute certain trusts thereby created, was a non-resident alien, who had never signified his acceptance, nor assumed the duties, of the office,—*Held*, that he might be removed, under the authority of Code Civ. Pro., § 2817, which permits the removal of a testamentary trustee for a cause which would prevent the issue of letters to him as an executor; and a successor be appointed as prescribed by *id.*, § 2818. *Id.*

See COMMISSIONS; INTEREST, 2, 3; OFFICIAL BOND, 1; PAYMENT OF LEGACY, 1.

#### TRUST.

Where a will appoints three persons trustees to receive the rents and income of property, and apply the same to the use of one of their number during life, with remainder over, the two who do not take beneficially are entitled to the custody of the principal of the trust fund, to the exclusion of the other. *Postley v. Cheyne*, 492.

See LIFE TENANT, 4; TESTAMENTARY TRUSTEE.

#### UNDERTAKING.

See APPEAL, 4.

#### UNDUE INFLUENCE.

Allegations of the exercise of undue influence over a decedent, in respect to the testamentary disposition of his property, must be proved like any other material fact. Their truth cannot be guessed out. *Stebbins v. Hart*, 501.

See TEMPORARY ADMINISTRATOR, 1.

## VESTING.

Testator's will devised certain property to A., in trust for his life, directing that, *at the death of the cestui que vie*, the same "be sold, and one third of the amount received be given to B., and \$100 of the remainder be given to C., and the residue I bequeath to" a society named. It further provided: "Whatever interest I may have in other real estate I devise the same to A., for life, and at his death to be converted into money and given to" the same society.—*Held*, that, by the terms of the will, the subject of the bequests to the society did not come into existence, and, therefore, the same did not vest, until C.'s death. *Jones v. M. E. Sunday School*, 271.

## WARD.

See GENERAL GUARDIAN ; GUARDIAN AD LITEM ; TESTAMENTARY GUARDIAN.

## WIDOW.

See ADVANCEMENT, 2 ; LETTERS OF ADMINISTRATION, 5.

## WILL.

1. Testator, who died March 20th, 1884, leaving a widow, brother and sister, him surviving, by his will, executed April 2nd, 1871, gave all his property, real and personal, to his wife for life, in lieu of dower ; authorized the executors to sell the real property whenever they deemed best for the interests of the estate ; and, after the wife's death, gave and bequeathed one half and one fourth of his property, respectively, to the "E." and "T." societies, corporations formed under the act of 1848 (ch. 319), and the remaining one fourth to the "M." society, a foreign corporation. In January, 1884, within two months before his death, he executed a codicil, modifying the will by providing that the three societies should share equally in the remainder. It was contended, in behalf of the domestic corporations, that the provisions of the will, in their favor, must stand, the codicil being a nullity, as to them, because the testator died within two months after its execution.—*Held*, 1. That the "M." society took one third of the real and personal estate, remaining after the life use,—the circumstance that such corporation thus enjoyed a privilege denied to the others constituting an argument to be addressed to the legislature, and not to the court. 2. That the gifts of the will, to the "E." and "T." societies, were revoked by the provisions concerning them, contained in the codicil ; which falling, under the statute, by reason of testator's death within two months after the execution of the latter instrument, those societies took nothing. 3. That, the will working no equitable conversion of the realty, the remainder in two thirds thereof was not subject to distribution ; while two thirds of the personal estate, remaining after the life use of the widow, belonged to her and the

- brother and sister, in the proportions prescribed by the statute, in case of intestacy. *Canfield v. Crandall*, 111.
2. Testator's will, after bequeathing a life interest in the residue of his estate to his wife for her maintenance, and the maintenance and education of their children until they became self-supporting, directed that, after the widow's death, all such property as then remained be disposed of, and the proceeds be divided "equally among the children I may then have, or those who may be legally entitled thereto." When the will was executed, testator had three children, of whom one died before him without issue, another before testator's widow, leaving a widow and children, and the third, J., survived both his parents.—*Held*, that J., as the sole survivor of his mother, was entitled to the exclusive benefit of the ultimate disposition made by the will, the intent of the italicized words being that, in the event of the death of all the children in the widow's lifetime, and only in such contingency, the property should eventually pass under the statute providing for distribution in cases of intestacy. *Kurst v. Paton*, 130.
  3. The word, "children," occurring in a will which furnished no evidence of a design to adopt a special and more extended meaning,—*Held*, to apply only to offspring in the first degree, and to exclude grandchildren, in accordance with the doctrine asserted in *Kirk v. Cashman*, 3 Dem., 242. *Id.*
  4. Testator, by his will, having given the income of the residue to his wife for life, devised and bequeathed, after the death of the latter, one fourth of the estate to each of three children, P., A. and S., their heirs and assigns; adding: "And in the case of the death of either of my said children, leaving issue, *before becoming entitled to his or her portion*, I give and devise the same to the issue of such child *living at the time of my death*, to be divided," etc. A. and S. died during the widow's lifetime, each leaving a child born before the death of the testator, and another born thereafter. The widow having died, a question arose as to the rights of the after-born grandchildren under the provisions of the will.—*Held*, (1) that the words first italicized referred to becoming *entitled* to possession, and not in interest; (2) that the latter italicized clause qualified "issue," and not "child"; and (3) that, therefore, the shares of A. and S., respectively, belonged to their children in being at the death of the testator. *Kinnan v. Card*, 158.
  5. Decedent, who left her surviving a mother, brothers and sisters, during her last illness, which occurred at a charitable institution in charge of a religious community incorporated under L. 1848, ch. 319, gave, by a bequest, absolute upon its face, to a member of that community, the bulk of her property. It was contended that the gift must be deemed to have been made in trust for the society, and was void under the statute cited, so far as it exceeded one half of the entire value of the estate; though the evidence failed to disclose the avowal of a purpose, or even a desire, on the part of testatrix, that the provision should enure to the benefit of the society.—*Held*, that the bequest was valid, and the legatee took absolutely. *Lynch v. Loretta*, 312.

6. Testator's will established a trust fund for the payment of certain life annuities, providing that, as the annuitants severally died, such portion of the fund as could be spared be divided among his grandchildren living at the time of such deaths. A codicil revoked all the provisions and bequests given to a grandchild, L., and her issue, in the *residuary clause* of the will.—*Held*, that L. was, nevertheless, entitled to share in the distribution of the remainders in the annuity fund. *Frame v. Willets*, 368.
7. Testator, who died in 1848, by his will bequeathed the residue of his estate, both real and personal, to the executors, in trust to hold and manage the same during the lives of his widow and son, receive the income, and pay the same, in specified proportions, to the widow, during her life, and his five children; with a direction for the division of the *corpus*, upon the death of the son and widow, among the remaining children. In 1868, a daughter, M., in consideration of a loan, to her, of \$15,000, funds of the estate, executed, in conjunction with her three children, an assignment of all her interest in decedent's estate, to an executor of, and trustee under the will, who was thereby authorized to hold and manage the same, and the proceeds thereof, until the loan should be repaid with interest, and, in case of default, to apply and appropriate the subject of the assignment to the payment of the indebtedness; which arrangement was carried into effect, M.'s share of the income being withheld by the trustee and distributed among the other beneficiaries, until he was discharged and a successor was appointed, by whom the same course was adopted. At the death of M., which occurred in 1885, after that of the widow and son, the former was indebted to the estate in a sum far greater than the total income which had accrued for her benefit since the last accounting, and which had passed through the hands of the trustee. Upon the accounting of the trustee, with a view to a final distribution of the estate, two of the three children of M., as executrices of her will, interposed various objections to the account, contending, *inter alia*, that the withholding of M.'s fifth of the income was a violation of the terms of the will.—*Held*, that objectors had no lawful claim against decedent's estate, except as to the excess, if any, of the value of M.'s entire interest therein, above the amount of her indebtedness; and that the objection should be overruled. *Young v. Purdy*, 455.

See LOST WILL; PROBATE OF WILL.

WITNESS.

1. The testimony, in favor of the proponent of a contested will, given by one named as a legatee therein—weighed and found wanting in credibility. *Porteus v. Holm*, 14.
2. Upon the hearing of a special proceeding instituted to procure probate of decedent's will, which, after bequeathing certain pecuniary legacies, gave the residue to a person therein named, proponent called, as

a witness, a legatee who had released his interest to the temporary administrator, to testify to communications between himself and decedent. Contestants objected to the admission of this paper and testimony on the ground that the former did not discharge the legacy, or, if it did, that it effected an assignment to the residuary legatee,—the witness being, in either case, incompetent under Code Civ. Pro., § 829.—*Held*, that both the paper and the testimony were competent, and should be received. *Stebbins v. Hart*, 501.

See LOST WILL, 2, 3; SUBSCRIBING WITNESS.

*Ex. G. A. A.*







**K**

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